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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES EX REL.
HAROLD D. ROGERS
vs.
MARK S. RICHMOND, WARDEN

APPENDIX TO APPELLANT'S BRIEF

ABRAHAM S. ULLMAN,
State's Attorney,
Attorney for Appellant.

ARTHUR T. GORMAN,
Asst. State's Attorney.

DOCKET ENTRIES

6294

Date 1956	
8/22.	Petition for Writ of Habeas Corpus filed.
8/24	Order for Writ of Habeas Corpus entered. Smith, J. Writ issued and handed Marshal with copies of same and of order.

DOCKET ENTRIES — *Continued*

8/25	Copies mailed Atty. Robinson & State's Attorney for New Haven County.
8/31	Hearing for Petition for Habeas Corpus commences. Respondents Return filed. Petitioner's exhibits A through F filed. Three witnesses for Petitioner sworn and testified. Three witnesses for Respondent sworn and testified. Respondent's exhibit 1 filed. Summation 3:08-3:27 P. M. Decision reserved on writ. Petitioner returned to the custody of the Respondent pending final determination. Smith, J.
9/20	Memorandum of Decision on Writ of Habeas Corpus entered. Smith J. (Judgment of conviction may be set aside.) Copies given State's Atty. and Thomas Robinson, Public Defender..
10/2	Judgment entered for the Relator, approved by the Court, on the merits providing that the judgment of conviction and the death sentence imposed upon said relator by the Superior Court for the County of New Haven, be vacated; that relator be discharged from the custody of the respondent unless relator is granted a new trial within sixty days after receipt of a mandate of the Court of Appeals and/or of the Supreme Court of the United States affirming this judgment. Earl, C. Attested copies thereof mailed to counsel for the relator and for the respondent.
10/11	Motion to Amend and Supplement Findings and for a Rehearing filed by respondents, and Notice of Motion filed.
10/29	Present Warden, Mark Richmond, substituted as party-respondent for Mr. Cummings. Respondent's Motion to Amend Findings and for Re-hearing. Decision reserved. Briefs to be submitted in one week. Smith, J.
11/14	Memorandum of Decision on Motion to Amend Findings and Motion for Rehearing filed in Hartford. Copy given to Mr. Ullman in Hartford, Mr. Robinson in New Haven.

DOCKET ENTRIES — *Continued*

11	16	Certificate of Probable Cause entered. Smith, J.
"		Notice of Appeal filed.
11	23	Bond for Costs on Appeal, filed.
11	28	Court Reporter's notes filed in Hartford. Sanders, R.
12	17	Petition for Extension of Time for Docketing Record on Appeal filed by respondent.
12	20	Motion to settle Record on Appeal and Notice thereof filed.
1957		
1	14	Hearing on Respondent's Motion to Settle Record on Appeal. Motion granted. Respondent's exhibits AA, AB, AC and AD marked for identification. Smith, J.
	30	Order extending time for filing Record on Appeal and docketing the appeal entered. Smith, J.

TRANSCRIPT OF TESTIMONY BEFORE THE DISTRICT COURT, SMITH, J.

August 31, 1956.

Mr. ROBINSON. May I address the Court briefly on the question of pleading. In the return, paragraph 3 there was what purports to be an admission of an allegation in paragraph 3 of the application in language and, I believe, intent quite different from the allegation which it purports to admit.

It is true that in paragraph 3 we have set forth the trial in the Superior Court, the appeal to the Superior Court and then an application to the United States Supreme Court for a Writ of Certiorari.

In order to add those up, the three there must be included, must be included the action of denial of the application for certiorari, that is under the law, I believe, and I so wish to have it noted on the record that that is our claim. We do not admit it, that there is no judgment on the issues, on the merits by such an action by the Supreme Court; it not being a matter of fact I don't think that we should unless required by the Court file a traverse.

Mr. ULLMAN. In other words, your denial relates only to the words, "and determined adversely to him by the three courts?"

Mr. ROBINSON. Yes.

Mr. ULLMAN. Very well.

Mr. ROBINSON. And, of course, we stand by our allegation of paragraph 3. I wish at the outset to offer a document which I have brought here from New Haven with the consent of the United States Attorney without a Clerk of the Court, to which that document is a part of the record.

Mr. ULLMAN. I fail to see the relevancy of it. I have no objection to the manner of introducing it. I don't insist on the appearance of the Clerk, but I object to it on the ground that it is irrelevant—any hearing or issue at this point.

Mr. ROBINSON. This document purports to show a prosecution in the City Court where the accused was represented by himself as counsel, where certain action was taken as alleged in

the application, and a bindover to the next term of the Superior Court, and I intend to follow that document up by the connecting document to support the allegations in the complaint showing the nature and the quality of the confinement of the accused while in the New Haven County Jail.

The COURT. It may be admitted Petitioner's Exhibit A.

Petitioner's Exhibit A: City Court document.

DANIEL J. PATTERSON, called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

By the Clerk.

Q. Your name, please? A. Daniel J. Patterson.

Q. Where are you from? A. New Haven, Connecticut.

Mr. ROBINSON. I don't know how important it is, may it please the Court, but I have no knowledge that Mr. Rogers is here other than that certain officers appeared. Is it so that he is here? Is Rogers here,

Mr. ULLMAN. I understand so. I saw him a little while ago.

Marshal FRAZER. Shall we bring him in, your Honor.

The COURT. You may bring him in.

Mr. ROBINSON. Shall I proceed now?

The COURT. Yes.

Direct Examination by Mr. Robinson:

Q. Mr. Clerk, you have his name and address?

Deputy Clerk MARKOWSKI. Yes.

Q. (Continuing.) In 1954, Mr. Patterson, what was your position? A. Deputy jailer at the New Haven County Jail.

Q. And as such jailer did you have immediate charge of the prisoners at the jail in January 1954? A. I did.

Mr. ROBINSON. May it be noted that the prisoner is here.

Q. In January 1954 did you have a prisoner Harold Rogers in the jail? A. I did.

Q. Do you recall what the nature of his commitment to the jail was? A. I don't remember right now.

Q. Can you say from your memory whether he was there on

a bindover, or he was a sentence prisoner? A. The Mitt was a bindover mitt from City Court.

Q. Showing you a paper, I will ask you whether or not that is the bindover Mitt or Mittimus that you refer to? A. That is it.

Q. Is that the original paper that he was held under? A. Yes.

Mr. ROBINSON. I offer it. Is there any objection?

Mr. ULLMAN. No.

The COURT: Petitioner's Exhibit B.

Petitioner's Exhibit B: Mittimus.

Q. This Mittimus that you have identified has certain stampings on the back of it. What do those stampings indicate in a general way first? A. On the Mittimus—

Mr. ULLMAN. The Mittimus speaks for itself. That is the best evidence. The witness shouldn't be asked what it indicates in a general way.

Mr. ROBINSON. Let me put a question that will be more specific.

Mr. ULLMAN. The Court can determine that.

Mr. ROBINSON. I will withdraw that question.

Q. As the prisoner is disposed of in the jail practice that you are familiar with at this time, is a notation made on the back of the Mittimus, for instance, if he is taken out of jail is there a note made on the back of the Mittimus? A. There is.

Q. And is it made at the day and time that the prisoner is taken from the jail? A. Yes.

Q. And are there such notations on the back of that Mittimus? A. There is.

Q. Do they truly represent to your knowledge what occurred in reference to his custody in or out of the jail so far as it purports to state? A. It does.

Q. I notice one of these is a receipt for—well, it reads this way: "To the keeper of the New Haven County Jail, then and there I remove the within named Harold Rogers from the New Haven County Jail. Edmund S. Flannigan, County Detective."

Do you recall the incident that brought about the notation of that on the back of the Mittimus? A. I do not.

Q. Was Harold Rogers delivered to Edward Flannigan at the jail and taken out of the jail? A. I don't know. I wasn't there.

Q. Who else in the jail would have acted on any request, if there was one to remove him from jail? A. If there is a turnkey on duty, if he had an order he would abide with the order.

Q. Do you know whether or not there was a letter from the State's Attorney asking that Rogers be delivered to Mr. Flannigan? A. I don't.

Q. Showing you a paper and ask you whether that refreshes your recollection? A. This is addressed to me.

Q. Was it in the papers at the New Haven County Jail that you brought down at the trial of Rogers? A. I am quite sure it was.

Q. Don't you recall that pursuant to that letter you delivered Rogers to Detective Flannigan connected with the State's Attorney's office? A. I don't remember turning Mr. Rogers over. Somebody of the personnel of the jail could have done it on evidence of this letter.

Q. Was that letter a part of the record at the jail at the time of the trial and the time you were served with the subpoena to bring the record down pertaining to the custody of Rogers? A. It was.

Q. Do you know of your own knowledge whether or not Harold Rogers was taken from the jail on January 30, 1954 which is the date of this endorsement on the back of the Mittimus that I have read to you? A. That is the only information I have, and that is what is on here. I have no knowledge.

Q. You have no reason to believe that this isn't correct? A. No, I have no reason.

Q. Do you know Edward S. Flannigan? A. I know him as the County Detective in New Haven County working in and out of the State's Attorneys office in New Haven.

Q. Is this his signature on the paper I have last shown you? A. Not seeing and being there when it was made, I wouldn't know.

Q. You don't know? A. I don't know.

Q. Well, don't you know, Mr. Patterson, that as a matter of fact Harold Rogers about noon on Saturday, January 30th was taken from the New Haven County Jail by the authority of the letter that I have shown you from the State's Attorneys office? A. By the evidence there he was taken.

Mr. ROBINSON. I offer the letter.

Mr. ULLMAN. I object to it, if your Honor please. If it please your Honor, counsel is claiming by virtue of the evidence that the taking of Rogers from the County Jail on that date is illegal. We do not concede that it was illegal, but assuming for the purposes of the argument that it was illegal, we claim that it has no relevancy or bearing, or is not a matter to be considered on the issues raised here in the Habeas Corpus proceeding.

There are United States Court cases that rule that constitutional requirements do not forbid removing a prisoner from jail for the purposes of examination by police officers. That point is precisely passed upon in the *United States* versus *Carignan*, 342 U. S. 36, and again in *Palakiko* versus *Harper*, 209 Fed. 2nd 75, in which case certiorari was denied by the United States Supreme Court. And I think it hardly requires a citation to the Court to establish the fact that under the law of the State of Connecticut a confession is not to be excluded because of any illegality in the situation of the accused at the time of giving it, and that is by a whole line of cases, *Gustamacchio*, *Zaukaukas*, *Buteau* cases in the Connecticut Supreme Court.

So I object to this, if your Honor please, on the ground that it has no relevancy or bearing upon any issue presented in this hearing.

Mr. ROBINSON. The answer to that is brief, it seems to me. We don't claim it to be—that a mere illegality and confinement or procedure in and of itself as is might be under a United States prosecution where the sixth amendment, I believe it is, applies in all its vigor, but over and over again the cases cited in the petition it has been held that all the circumstances surrounding the procurement of a confession in their totality are not in and of themselves sufficient to tend to prove the lack of due process or its presence. Now for the first time there has been any question about this letter. The letter was received in evidence, went in in the State Court, as your Honor sees it. It has been marked as an exhibit and there is no question about that.

The claim is based upon the fact that under that bindover, Mittimus, this accused was supposed to be held in the jail until he was legally by proper process removed from the jail, and so did Judge O'Sullivan say in his dissent, and the majority opinion

says, conceding that, that that should be so. Nevertheless—then it goes on to say under our rules it doesn't affect the propriety of the ruling on the admission of the confession. But we are in a different court now; we have different rulings. Your Honor is not bound by the procedures in the State Court. And all the facts tend to show illegality of confinement, just as strongly as the failure to present to a proper magistrate circumstances in and of themselves which might not be held to be sufficient, are all a part of the picture that your Honor has got to resolve as to whether or not under the Federal Rules in a capital case coming from a State Court anyone of these circumstances ought to be excluded because of its irrelevancy.

Mr. Ullman. I am not relying, if Your Honor please, solely on Connecticut cases, but this precise point was raised in *Stein* against *New York* where it says the Court recognized that evidence obtained by illegal means may not void State convictions, and the 14th amendment does not prohibit a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive. *Stein* versus *New York* 346, at 192.

The Court. I am inclined to think that counsel for the Defendant is correct in the effect of the illegality as it stands as a ground in itself. However, it does appear to be a part of the entire picture and setting forth whatever effect it may have. And we cannot tell that until the entire picture of the circumstances of the confession is developed. Whether it will be material then I cannot say.

I will admit it as part of the entire picture without intending to rule by that that the illegality, if established in and of itself, would be any ground to produce a Habeas Corpus.

Mr. Robinson. We don't claim that. I think my friend ought to know that.

Mr. Ullman. It is nice to hear you say so. I don't know whether I ought to know it, but anyway it is nice to hear you say that.

Mr. Robinson. I mean you know that is my position.

Well, I still offer the document, Mr. Ullman.

Mr. ULLMAN. I object. And I understand the Court has overruled the objection.

The COURT. The objection is overruled. Petitioner's Exhibit C.

Petitioner's Exhibit C: Letter.

Q. Just before we leave this Petitioner's Exhibit B, I call your attention to the first entry on the back, Mr. Patterson, and ask you whether or not in the jail practice as you then knew it and controlled it in January 1954, whether or not that does not indicate that the prisoner was delivered at the jail at the date indicated by the officers who signed that stamped legend? A. He was delivered at the jail by Officer J. Sparaco.

Q. And on the date indicated? A. On the Mittimus.

Q. Indicated on the Mittimus? A. That's right.

Q. Do you want to see this? A. Well, the stamp here is our stamp.

Q. Pointing to— A. January 13.

Q. That is put on at the jail; is that what you mean? A. That is what I mean, it is by the Clerk. And the date is put on by the turnkey at the desk when he is brought in.

Q. So that we get it straight for the record, you pointed to the date on the back? A. The date, January 13.

Q. 1954. And it is the turnkey's date? A. That's right. He stamps it then.

Q. And is the jail stamp and becomes a part of the jail file? A. That's right.

Q. That dates are both the same, January 13th, 1954? A. That's right.

Q. On January 30, 1954 was there to your knowledge some sort of event in New Haven that you recall that brought you and the coroner together? A. Not on that date.

Q. What date? A. I think it was January 31.

Q. Do you remember the day of the week? A. The day of the week?

Q. The day of the week. It was a Sunday.

Q. Were you at the jail on Sunday, January 31? A. I was.

Q. What time did you get there and how long did you stay? A. I would say in and around ten o'clock for about fifteen minutes.

Q. Then did you go somewhere? A. Back to where I started from, back to the scene—

Q. You said the "scene." So that the Court will understand it, was there an explosion in New Haven that caused some deaths on that early morning? A. There was.

Q. And you went back, I suppose, to do some errand of mercy, or something of that kind? A. I did.

Q. Did you see the coroner there? A. When I first got there, after standing around for about five minutes, he approached me.

Q. Did he ask you to deliver some message to the jailer, to the sheriff? A. Yes, he did.

Q. Was it about a particular prisoner? A. It was.

Q. Whether or not it was about Harold Rogers? A. It was.

Q. Did he give you any instructions as to what he wanted to have done with Harold Rogers? A. He did.

Q. What did he say? A. He said he wanted Harold Rogers to have the sheriff notified that he wanted Harold Rogers held incommunicato.

Q. You held prisoners incommunicato in the jail? A. I have.

Q. You knew what was intended by that order? A. I did.

Q. And did you communicate that order to the sheriff? A. I did.

Q. About what time? A. Ten, ten thirty possibly. It was anywhere from ten, to ten twenty maybe.

Q. And from then on to your knowledge whether or not Harold Rogers was held incommunicato? A. Yes.

Q. Did the coroner in talking to you say anything about a so-called coroner's warrant? A. He did.

Q. Whether or not it was in the nature of a statement to the effect that he hadn't gotten one out or because of a shortage of help, or something of that kind? A. No. He said that he was at the scene of the explosion, that he couldn't leave the scene to get a Coroner's warrant, and for—couldn't get a Coroner's warrant for us, and this directive that he was giving me was just orally.

Q. But it was put into force and effect? A. It was by his direction.

Q. Did that order as it was put into effect to your knowledge prevent Harold Rogers from seeing his attorney?

Mr. ULLMAN. I object to that, if your Honor please. I think it is well established, and there are cases cited by counsel in his petition that point out that there is no right of an accused to counsel, no constitutional right of an accused to counsel until arraignment.

At this date it would seem it was long prior to arraignment. At all times, as we have admitted in our return, at all pertinent times from the date of the Grand Jury indictment which was long before arraignment, the accused had counsel. That is contained and set forth in the petition filed here for the Writ. Counsel represented the accused from the date of the Grand Jury hearing and at all times since. And there is no right to counsel during interrogation by the police or at the time of the arrest, and that is well established by many cases in the Supreme Court, *Straubel* versus *California*. The denial of counsel during interrogation by the police or coroner would not consitute a violation of due process. All of the cases cited by counsel in his petition, as well as in the briefs, petitions that he filed in other courts, establish the fact that only upon arraignment does an accused have any constitutional right to counsel.

So I object to it as being altogether irrelevant and impertinent.

Mr. ROBINSON. May I answer briefly. The case cited by my friend in reply to our petition for certiorari is the case of *Hatch* versus *Olson* 326, 271, and it certainly doesn't say that a person is not entitled to have a lawyer, one that he has employed, one that he has consulted with, but it concerns itself solely with what the duty of the Court is against the threat of a claim that the Court has unjustifiably gone ahead with the case when counsel didn't appear. It has to do with his right to have counsel assigned.

Now, on the basis of fact up to the present, your Honor will see from Exhibit A that he had counsel in the City Court, he was being held on the City Court process, no other process had been started against him whatsoever. And so we claim that none of these authorities say that a man, simply because he hasn't been arraigned, may not complain of police oppression that deprives him of the right to consult his attorney. (a) When he has got

one and (b) perhaps not so strongly, when he wishes to have one and asks for one. But none of these authorities that my friend adverts to say anything further than this, that on an attack, I guess under the 6th amendment, this right which is violated is a constitutional one, a violation in and of itself commences with an arraignment.

In addition to that we claim this as also one of those facts that entitled us to relief under the rights covered by the 14th amendment.

Mr. ULLMAN. If your Honor please, I don't see how counsel can interpret *Straubel* against *California* from any such proposition. But I don't rely on my cases cited in my brief; I rely on cases cited by counsel for the petitioner here that not one case asks anything more than that in advance of the trial and at the time of arraignment the accused be allowed representation, and opportunity for consultation with counsel. Now, he had such representation, he had such opportunity for consultation for months before he was presented on trial from the date of the Grand Jury hearing and even before, as we will show, as we will show towards the end of the hearing, and at all times afterwards. That is all the constitution asks in situations such as this.

The COURT. It would appear to be admissible as part of the circumstances leading up to the confessions even if it is not as counsel contends in itself a violation of the constitutional right to counsel. And again, I am inclined to think that on the latter point counsel for the Defendant is correct that it is admissible.

I will overrule the objection.

Mr. ROBINSON. May we have the question read?

(The pending question read.)

Q. Will you answer the question. A. Yes.

Q. You mean that it did prevent him from seeing his attorney? A. Yes.

Q. Were you present at the jail on Sunday about ten thirty or eleven o'clock when counsel appeared and asked to see Harold Rogers? A. I was there but nothing was said to me about that.

Q. Did you see counsel appear? A. Did I see counsel?

Q. Yes. A. I saw an attorney there.

Q. Did you see Mr. Corse associated with me? A. Yes.

Q. Mr. Corse is somebody that has been known to you for a number of years? A. Yes, while I was at the jail.

Q. And you knew him as an associate of mine; didn't you? A. I did.

Q. If I understand you correctly, this order was in effect to your knowledge from the time you communicated it to the sheriff? A. That's right.

Q. And from there on until after the coroner had seen you, from there on until after the coroner had had his hearing? A. That's right.

Q. And sometime after that hearing was concluded did you get some sort of an oral order from the coroner saying it is all right now, you can let him see whoever he wants to? A. That is the usual procedure.

Q. There is no written lifting of that order; is there to your knowledge? A. There has been.

Q. Was there in this case? A. I don't recall.

Q. Do you recall sometime late after one o'clock, say on Sunday, that some police officer or in some other way a coroner's warrant was delivered to the jail? A. I don't know.

Q. Do you know whether a coroner's warrant was delivered to the jail? A. It was delivered. When it was delivered I don't know. I wasn't there.

Q. Showing this paper to you and I will ask you whether that paper isn't a part of the jail file or wasn't a part of the jail file in 1954 concerning Harold Rogers? A. This is a coroner's warrant.

Q. Is it the coroner's warrant that had to do with the case of Harold Rogers? A. It is.

Q. You gather that from its notations? A. I do.

Q. And you have seen it before? A. I have seen it before.

Q. Have you? A. Yes, I have.

Q. And produced it in Court on Rogers' trial? A. I did.

Mr. ROBINSON. I offer this.

Mr. ULLMAN. No objection.

The COURT. Petitioner's Exhibit D.

Petitioner's Exhibit D: Coroner's Warrant.

Q. Now, this warrant that you have identified and has been admitted by the Court contains the language—and not reading the whole of it—but says this: "Said keeper of jail—" Was that you at the time? A. It was.

Q. "Is commanded to receive and keep safely and hold Harold Rogers within said jail until the expiration of said twenty-four hours from and after the finding of said coroner in and upon said inquest.".

After the receipt of this paper at the jail and before the coroner had made any inquest or had made any finding in the inquest did you keep Rogers there continually in the jail? A. He is supposed to be kept there. I wasn't around.

Q. I am not asking you to interpret this. Don't you know he was taken out the very afternoon that the coroner's warrant Exhibit D— A. I heard he was taken out.

Q. Were you at the jail when he was brought back? A. No, I wasn't.

Q. Do you know how long he was away from your own personal knowledge? A. I don't know.

Q. Was it a matter of hours to your personal knowledge? A. I wouldn't know.

Q. You don't know, do you? A. No, I don't know.

Q. You saw Mr. Corse at the jail. Did you see some police officers there requesting to see Rogers? A. I did not.

Q. How long did you stay after you saw Corse there? A. I had a container that I filled with coffee and went back to the scene of the explosion. I would say my time spent there would be ten minutes.

Q. You didn't come back at all that day? A. I did not come back.

Mr. Robinson. You may inquire.

Cross-examination by Mr. Ullman.

Q. Directly after the 31st of January after the Coroner's hearing that was held late that afternoon this order of incommunicato was released—withdrawn? A. I don't remember.

Q. Do you know that on the following day and on many days

afterwards that counsel were permitted—and all days afterwards—counsel were permitted to talk to Rogers? A. It could be.

Mr. Ullman. No further questions.

(Witness excused.)

James P. Redding, called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

By the Clerk.

Q. Your name, please? A. James P. Redding.

Q. Where are you from? A. New Haven

Direct Examination by Mr. Robinson.

Q. Mr. Redding, you now hold no public office if I recall correctly? A. Yes.

Q. And you are in business in New Haven, aren't you? A. That's correct.

Q. In January 1954 were you the Sheriff at New Haven County? A. I was.

Q. Living at the jail? A. Right.

Q. And as such Sheriff did you become acquainted with Harold D. Rogers? A. Harold Rogers.

Q. Harold Rogers who sits here at the table? A. That's right.

Q. While you were Sheriff, and more particularly in January was the last witness your jailer? A. That's correct.

Q. What were his duties? A. Well, he had sole charge of the jail records, and custodian of all prisoners therein.

Q. Do you recall Rogers being taken from the jail on or about noon on Saturday, January 30th? A. No, I can't recall that.

Q. Do you recall his being taken at any time from the jail to your own knowledge? A. On the 31st of January.

Q. What time was he taken from the jail? A. Well, just before mess. I would say approximately five, five fifteen.

Q. In the late afternoon? A. Right.

Q. And who took him? A. I did.

Q. Were you complying with some request when you took him? A. That's right.

Q. From whom? A. The Coroner.

Q. Was that made by telephone? A. Yes, I believe it was.

Q. Where did you take him? A. Took him up to the Coroner's office in the courthouse. Not his office, but a room adjoining there.

Q. Did you deliver him there? A. I did.

Q. Where did you go? A. Right there outside with the guards.

Q. You were not in the room? A. No.

Q. You say "outside with the guards." Who were the guards? Were they jail guards or policemen? A. Jail guards.

Q. How many? A. Two.

Q. Did you take him directly from the jail? A. That's right.

Q. Did you tell him where he was going to be taken? A. That's right, I did.

Q. What did you tell him? A. "Rogers, we are going to the Coroner's office."

Q. The Coroner's office? A. That's right.

Q. How long did you tell him that before you took him? A. Well, after he came out of the jail I told him that is where we were heading for.

Q. That is, he had already been escorted out to the front of the jail? A. That's right.

Q. You told him that out in the street? A. No, I told him that in the jail.

Q. Did you go immediately down to the Coroner's office? A. Yes, I did.

Q. In an automobile? A. Right.

Q. And stopped nowhere? A. Nowheres.

Q. He saw nobody on the way down? A. No, he did not.

Q. Was he to your knowledge under an order that prevented him from seeing anybody including counsel at that time? A. That's right.

Q. Earlier that day did you see Mr. Corse at the jail? A. I did.

Q. Did he request you to let him see Rogers? A. He did.

Q. Did you let him see Rogers? A. I did not.

Q. Did you make some telephone calls in reference to his request? A. Well, it would be a little difficult to answer that. Of course, it has been brought out here that he was incommunicato

status, and while I would have obeyed the incommunicato status anyway, I wouldn't let anyone see the prisoner. I did try to contact the State's office to just kind of clarify the situation as far as my mind was concerned as to if I was acting correctly.

Q. Did you get any permission from the State's Attorney to let Rogers see his counsel? A. No. I just told the attorney the incommunicato status in which he was there and which I had.

Q. So you got no permission from him or anybody else to let the attorney see him? A. That's right.

Q. Now, there wasn't any other reason that you didn't let the attorneys see Rogers? A. No.

Q. And it wasn't upsetting your discipline at the jail or your regime at the jail to have the attorneys in to see their client at that hour on Sunday? A. No, not as long as they conformed to the rules of the jail.

Q. There was no claim that there was non-conformance? A. Oh, no.

Q. Did you see some police officers up there after you had refused Rogers the opportunity to see Mr. Corse? Did some police officers come up there to see him? A. Yes. I believe there were two officers.

Q. Do you know whether or not they went in to see him? A. I don't believe they did.

Q. Do you know whether they did or not? A. They shouldn't after my orders.

Q. I am not asking you that. Did they? A. I don't believe they did.

Q. Don't you know as a matter of fact that at least one went in and took some pictures of portions of Rogers' body? A. If I did, I would answer the question different.

Q. Is the answer that you don't know? A. That's right. Q. There has been no question—I will withdraw that. There is some question as to someone's memory about this letter. Do you recall whether or not on Saturday, January 30th Rogers was taken from the jail on a letter from the State's Attorneys office? A. wouldn't know that. Mr. Patterson would know that.

Q. Were you familiar of your own knowledge as to whether

Rogers on Saturday was taken from the jail? A. No. I don't believe I could say I do.

Q. Do you have any knowledge of the time that he came back to the jail, if he was taken away, anything in your memory about that? A. No.

Q. Were you living at the jail? A. That's right.

Q. But in another part of the building? A. That's right.

Q. From that front part that has to do with cell blocks, and things of that kind? A. That's right.

Q. So he might have been brought in and delivered to a guard? A. Possibly.

Q. Anytime during the night, or any time you weren't there and you would not know about it? A. It is very possible.

Mr. ROBINSON. You may inquire.

Cross-examination by Mr. Ullman.

Q. Do you know what time you returned him on the 31st to the jail? A. I know he didn't have anything to eat. I think approximately seven o'clock.

Q. In other words, in time to get something to eat at the jail? A. That's right.

Q. And do you recall that directly after that this order holding the prisoner incommunicato was removed? A. I believe it was removed after that hearing.

Q. And was counsel for the accused permitted to see him at all times within the general rules? A. On the 31st, other than that when I refused Corse permission to see him, counsel came in to see me about seeing him.

Q. Do you happen to know whether counsel did see him at any time that they desired after the 31st? A. After the incommunicato status was removed they could come in.

Q. There was no refusal of permission to see the accused at any time after the 31st? A. No.

Redirect Examination by Mr. Robinson.

Q. Do you know that on the 31st the order was lifted by letter or telephone, or wasn't it two or three days afterwards? A. Well,

I knew the status was off, I believe, the following day. But again Mr. Patterson would get all the records since he is custodian of all the records and that would come to him or to the jail.

Q. Do you remember him telling you on the following day that he heard from the Coroner and that it was all right to let counsel in? A. Are you referring to Sunday, the 31st?

Q. I am referring to Monday after the Coroner had his hearing? A. No, I can't honestly say that we talked about it.

Q. Do you recall whether or not counsel, while he was at the jail, Mr. Corse was at the jail, made some telephone call to some judge of the Superior Court? Do you recall that? A. No, I don't.

Mr. ROBINSON. That's all.

Mr. ULLMAN. No further questions.

(Witness excused.)

HAROLD D. ROGERS, called as a witness on his own behalf, being first duly sworn, testified as follows:

By the Clerk.

Q. Your name, please? A. Harold D. Rogers.

Q. And where do you live? A. 185 Ashman Street.

Q. In what city? A. New Haven.

Direct Examination by Mr. Robinson.

Q. At the present time, Mr. Rogers, you have been confined for some time to the State Prison? A. That's right.

Q. And you are under sentence of death? A. That's right.

Q. And have recently received a copy of a reprieve of the execution of your sentence which was set for the 10th of September? A. That's right.

Q. Have you got that reprieve with you? A. I didn't bring it.

Mr. ROBINSON. May we agree that the date of execution is set for November?

The WITNESS. 19th.

Mr. ULLMAN. I believe that is right.

Q. Sometime in the early part of January 1954 were you arrested in New Haven? A. That's right.

Q. And before your arrest were you living in New Haven? A. 704 Orchard Street.

Q. Keep your voice up. A. 704 Orchard Street, New Haven.

Q. And at that address did you have a family? A. I had a wife and two foster children.

Q. Were these children that you and your wife had living with you for some time? A. That's right.

Q. They were colored children? A. That's right.

Q. And were State children so-called? A. That's right.

Q. Was that the whole of your family, your wife, and these two youngsters? A. That's all my immediate family.

Q. I mean that were living there at that particular time? A. That's all.

Q. How old are you at the present time? A. 48.

Q. Just a few questions that I should have asked you, perhaps. Where were you born? A. New York City.

Q. How far did you go in school? A. Eighth grade.

Q. Did you immediately go to work after you got out of school? A. I went to work in Winchester Bowling Alley as soon as I got working papers.

Q. And without going into all the details of your employment what has been the general nature of your work up to January 1954? A. Bricklayer and painter—housepainter. I worked with construction—mostly.

Q. Have you got only one eye? A. That's right.

Q. And how did you lose that? A. I lost it in New York in 1928 plastering a ceiling.

Q. Was it a lime burn? A. Lime burn.

Q. When you were arrested in New Haven in January 1954 did you obtain for yourself a lawyer, or did somebody obtain for you a lawyer? A. My wife obtained you.

Q. What? A. My wife hired you.

Q. And did you know Mr. Corse in my office? A. That's right.

Q. And did I appear for you in the City Court, or were you in the City Court at New Haven? A. You did.

Q. And on my advice did you waive examination and were bound over? A. I did.

Q. I will look for it later on. I wanted to see the term of Court in which the bindover was.

The COURT. I think it is April.

Mr. ROBINSON. It is April as a matter of fact. May I ask your Honor to take judicial notice of the statute about it.

Q. And you were in the jail, were you not, from the day of the bindover until January 30, 1954? A. I was.

Q. What was the condition of your wife's health at the time? A. She had arthritis. She could hardly walk.

Q. Did you observe that condition? A. She was taking treatment from a doctor.

Q. Did you on any occasions have to give some treatment in the home yourself for her arthritis? A. I had to rub her down practically every night.

Q. What part of her body seemed to be the most affected? A. Her legs and her hip.

Q. How long had she suffered from that condition? A. Since 1945.

Q. You were in the jail on January 30th on a Saturday, were you not? A. That's right.

Q. Were you taken from the jail? A. I was.

Q. By whom? A. By two or three detectives.

Q. Do you know who they were? A. One was Sergeant Mulhern, whatever his name is.

Q. Mulhern, is that the way you heard me pronounce his name, Sergeant Mulhern? A. Yes.

Mr. ROBINSON. Will you stand up.

(A person stands.)

Q. Is this Sergeant Mulhern or— A. That's right.

Q. Anybody else? A. I think Ruggerio.

Mr. ROBINSON. Mr. Ruggerio, will you indicate your presence?

(A person stands.)

Q. Is that he? A. That's right.

Q. While you were in the jail were some sort of shackles put on you? A. When I went down to the attorney's office—

Q. Wait a minute. While you were in the jail you were handcuffed. Before they took you out did they handcuff you? A. Before they took me out of jail?

Q. Yes. A. Yes.

Q. And what sort of handcuffs did they put on? I don't mean the name or manufacture. A. They put a cuff on each hand. My hands were cuffed together.

Q. Did they attach the handcuffs at that time to anything else? A. No, not at that time.

Q. Later on did they? A. When the Sheriff Redding took me down to put a belt on me and handcuffed the cuffs to the belt.

Q. That was on the next day? A. That's right.

Q. So when you were taken down by these two officers that you pointed out, you were taken down simply with handcuffs on? A. That's right.

Q. Where were you taken? A. To the District Attorney's office in the courthouse.

Q. What? A. To the District Attorney's office on Church Street and Elm Street in New Haven.

Q. By District Attorney I suppose you mean the State's Attorney. You know Mr. Ullman to be the State's Attorney who prosecuted you? A. I didn't know him then.

Q. It was to his office you were taken? A. That's right.

Q. What time did you get there to your best memory? A. I left the County Jail right after dinner, and then it was eleven, twelve. I must have gotten there around one o'clock.

Q. Did you eat anything at the jail at dinner time? A. I went there but I didn't eat anything. I went to the mess hall.

Q. You have to go to the mess hall whether you eat or not? A. Or else you get locked back up in your cell.

Q. Was there any reason why you didn't eat anything at that meal? A. I didn't necessarily like the food.

Q. Well, you didn't eat anything? A. No.

Q. Well, were you going to get something to eat? Is there some provision at the jail? A. They have a place there where they sell milk, cake, candy, and orangeade, in quart containers and that is what I lived off of.

Q. And that was what you intended to do on that day? A. That's right.

Q. So that when you left the jail you hadn't had any noon meal; is that so? A. That's right.

Q. When you got to the State's Attorneys office—I am going to change the District Attorney to the State's Attorney—where were you taken? A. Taken into the District Attorney's office on the 2nd floor, I think it was, in a room in the corner behind the court, behind the courtroom.

Q. Let's not get confused about seconds and third stories in that courthouse. You mean you had to go up some stairs in order to get there? A. Yes.

Q. Stairs on the outside of the building? A. Stairs as you come in the hall where you went up a flight or two of stairs and then you walked and turned to your left and went in the office.

Q. Well, that is the same floor that the courtroom was or is on where you were tried? A. Yes.

Mr. ROBINSON. I think we can agree that is the first floor of the courthouse, Mr. Ullman, may we not?

Q. Well, and what happened when you first got there? A. They took me in the room and sat me down in the chair and nobody spoke to me over an hour.

Q. Who was there with you? A. Ruggerio was there most of the time, and then Sergeant Mulhern, whoever his name is.

Q. Mulhern? A. He came in, and I think the County Detective was in there.

Q. Which County Detective? A. (Indicating.) On the end.

Q. Mr. Holtz? A. The one on the end seat in the front row.

Q. The other one isn't here—Mr. Flannigan isn't here? A. No.

Q. Mr. Holtz, is that the one? A. The one sitting there. I think he was there.

Q. And were you still handcuffed? A. Yes.

Q. Both hands together? A. That's right.

Q. Do you remember anybody saying anything to you during the first hour you were there? A. Nobody said nothing to me. They walked in and out of the other office and talked with each

other, and came back and set down and wouldn't open their mouths.

Q. Whether they would nor not, they didn't, is that what you mean to say? A. Yes.

Q. Did they produce a gun at any time? A. Yes. I think the County Detective took one out of the drawer.

Q. What did he do with it? A. He laid it on the desk; never said nothing, just laid it on the desk.

Q. And left you there with the gun in front of you? A. That's right.

Q. At some time did they start to ask you questions? A. The policeman from West Haven came in. I think his name was Harvey, or something like that—and him and another fellow.

Q. The policeman from West Haven and another stout fellow? A. That's right.

Q. Do you recognize the name of Wilson as attaching to anybody that saw you that day? A. Both of them were there. I don't know which is which. I know the two names were mentioned.

Q. Wilson and Harvey? A. That's right.

Q. What was the first thing that was said to you as far as you remember? A. Well, one of them said—I don't know which one said it—but one of them said I was here pertaining to a murder in West Haven. A woman was killed in a package store and I was supposed to be the one that did it. They had the gun and they claimed that ballistics from Hartford had said the gun was the gun that fired, killed the woman. I said I didn't do it. They said I did it and why not confess and get it over with.

Q. Do you remember who said that? A. One of the West Haven cops.

Q. Is that the first time that anybody said anything to you about why you were there? A. That's right.

Q. When you heard that, what did you say? A. I said I didn't know anything about it. I don't even know where the place is at.

Q. What happened from then on? A. Every once in a while one of them would shoot a question at me. "You know you are guilty." "Why don't you confess." I kept on saying I didn't know anything about it.

Q. How long did that continue? A. Until about eight o'clock.

Q. In the evening? A. That's right.

Q. Did these officers go in and out or all stay together all the time? A. They went in and out most of the time, talked in the other room among each other and then came back and shot a question at me. The only one that stayed in there all the time was Ruggerio. He stayed in the office all the time. He sat off in the corner desk.

Q. Did you say anything to the officers at any time about wanting to see your lawyer? A. I spoke two times before Cheif Egan, and then I asked them and nobody answered me.

Q. What did you say precisely? What did you say? A. I said I wanted to see my lawyer.

Q. Did anybody ask you who your lawyer was? A. No.

Q. Did anybody make any answer to that statement that you wanted to see your lawyer? A. No, nobody answered me whatsoever.

Q. Did anybody at the beginning of this session that you say lasted on through the afternoon warn you that anything you said might be used against you? A. No.

Mr. ULLMAN. Object to that. There is no requirement in law for that.

The COURT. The objection is overruled.

Q. Did anybody inform you that you had a right to consult your lawyer? A. No.

Q. Did anybody tell you that you didn't have to make any statement at all? A. No.

Q. Did anybody get you anything to eat? A. Yes. One of them sent out and got coffee and a hamburger. A cup of coffee and a hamburger.

Q. What time was that? A. Around four, five o'clock, six o'clock.

Q. Did they offer you any more? A. Not until Chief Egan came in.

Q. At one time did you say you would like to smoke? A. That's right.

Q. What happened then? A. They took one cuff off and handcuffed the thing to the chair and left one hand free.

Q. If I understand you correctly, you had one hand free and you had the other hand with a cuff around it, and the empty cuff was around the third—the empty cuff was around the chair arm? A. Yes.

Q. Was the chair something like the one you are sitting in insofar as the arm is? A. It was practically the same only a little bigger.

Q. And did that condition of your handcuffs remain until after Chief Eagan got there? A. Remained until I went out. Then put the other cuff on my other arm.

Q. To take you out? A. That's right.

Q. Do you recall whether you stood up at any time from the time you got there until they took you out? A. Never got out of the chair.

Q. And so as to the length of time you were there at this point how long? When was it that you left the courthouse to go back to jail? A. It must have been about twelve thirty, one o'clock in the morning.

Q. Sunday morning? A. That's right.

Q. Did anybody make any claim to you that on that occasion they had the goods on you so far as five witnesses went? A. Detective from West Haven said he was going to place me coming out of the store.

Q. Did anybody say anything to you to the effect, "You know you are guilty, why don't you confess and let us go home?" A. I think either one of them said it.

Q. Either one of these two detectives here? A. I don't know which one said it, but one of them said it.

Q. Did anyone say anything to the effect that you are lying and what they would do to you? A. Ruggerio said he should have punched me in the mouth. He said, "You are lying. You are guilty."

Q. You didn't—Well, he didn't make any effort to punch you in the mouth? A. No.

Q. You were handcuffed to the chair? A. That's right.

Q. Now, you say about eight o'clock that Chief Eagan came in? A. That's right.

Q. He hadn't been there all forenoon or all that afternoon? A. No.

Q. What took place after he got there? What did he say to you? A. He sat down and started talking about the time I was in the County Jail on parole from Elmira that he remembered me from then, and then he said—in other words, I didn't have to say nothing to him. He didn't force nothing out of me until he started making a telephone call.

Q. Tell me about the telephone calls? A. He went to the telephone and said he was going to call my wife down and that I would be less than a man to have her locked up and that to have her tell what she knew. I said, "What for? She don't know anything."

So he went to the telephone and dialed a number and told his office or someone to hold a car ready to pick up my wife and the two children and place the children in some kind of a home for the night and bring my wife there, and he said he would call back in an hour.

Q. Whether or not you believed that he had called his office and made an arrangement to take your wife into custody? A. I believed it because he went to the telephone and dialed the telephone.

Q. Was it only when he was testifying in your trial that you heard him say that that was a fake telephone call? A. That's right.

Q. And did you hear him say anything over the telephone on this telephone call about how long to hold up the squad car? A. An hour. One hour.

Q. And during that hour what happened? Did you say anything? A. Not until he went back to the telephone and dialed again.

Q. Did you see him do that? A. That's right.

Q. Then what did you do? A. Then I told him.

Q. Made the confession? A. That's right.

Q. Why did you make the confession then? A. Because my wife was sick and I didn't want her to get locked up.

Q. Is that the reason you did it? A. That's right.

Q. Had you refused to comply with their request and their suggestions throughout the afternoon? A. That's right.

Q. Until this telephonic call about your wife? A. That's right.

Q. Your wife had been sick, hadn't she? A. That's right.

Q. And you knew at the time, didn't you, from something you heard from your wife that the officers had been out to the house demanding—that they had been out to the house and found her in bed on one occasion? A. That's right.

Q. That was before you were taken down on Saturday and it was in reference to this other charge? A. That's right.

Q. On your trial in the Superior Court in New Haven County did either officer Mulhern or Ruggerio testify? A. I'm not quite sure. I know they were there, but I don't know whether they testified or not.

Q. You were there all the time? A. But I don't remember them getting up on the stand.

Q. You don't remember them testifying? A. That's right. I know they were in the courtroom.

Q. Chief Eagan testified? A. That's right.

Q. Quite at length? A. Yes.

Q. After Chief Eagan got there did you ask him if you could see a lawyer? A. I told him I wanted to see my lawyer. He never answered me.

Q. He testified, didn't he? A. That's right.

Q. And you heard him say that you didn't make such a request but that he wouldn't let you have a lawyer if it had been made? A. That's right.

Q. When you first got there, or shortly after the first hour, somebody told you that they had a report about the gun, didn't they? A. The officer from West Haven.

Q. Was that about the first of the interview? A. That's right.

Q. And did he say more than once about that? A. He said the gun was checked by the Connecticut Ballistics in Hartford and it was proved that that gun was the gun that shot and killed a woman in West Haven.

Q. And after that statement was made to you, you didn't admit to anything? A. No.

Mr. ULLMAN. I object to that, if Your Honor please. I think the witness should be permitted to testify, not counsel.

Mr. ROBINSON. Perhaps that is correct. It may go out.

Q. You say that Egan mentioned to you that he knew you and he knew about you being in jail sometime or other? A. That's right.

Q. Whether or not that had something to do with an unexpired parole? A. I was on parole from Elmira.

Q. How old were you then? A. About twenty-two, twenty-three.

Q. Mr. Rogers, in 1949 were you charged with selling whiskey in New Haven? A. That's right.

Q. And on that occasion did the police detectives make any threats to prosecute your wife for that thing?

Mr. ULLMAN. I object, if your Honor please.

Mr. ROBINSON. One of the circumstances to show from the particular police department a threat.

Mr. ULLMAN. It has no place in this case.

Mr. ROBINSON. Well, let me withdraw it, your Honor, and perhaps I might get at it some other way.

Well, I think you may inquire.

Cross-examination by Mr. Ullman.

Q. You testified, Mr. Rogers, at the hearing, the preliminary hearing on the admission of the confession? A. I testified.

Q. Yes, and in the trial court in the Superior Court? A. Yes, I testified I was forced to make it indirectly.

Q. You testified at that hearing? A. That's right

Q. You testified fully? A. That's right.

Q. You were asked questions by your counsel over quite some period of time; is that so? A. Yes, and then you asked me—

Q. You didn't testify at that time that Sergeant Mulhern ever threatened to punch you; did you?

Mr. ROBINSON. Object to that.

Q. Did you testify to that effect or not?

Mr. ROBINSON. That isn't the testimony here. The testimony was Ruggerio made that threat. That was his testimony.

Mr. ULLMAN. I will withdraw that.

Q. You didn't testify at that hearing that Ruggerio or anybody else threatened to punch you? A. I wasn't asked no question as to that effect.

Q. You weren't asked any question to that effect? A. No, I wasn't.

Q. That was shortly after this confession of January 30, wasn't it? A. That's right.

Q. And you had been consulting with your counsel for the previous three months regarding the preparation for trial; is that right? A. That's right.

Q. And you say that you failed to say that because your counsel didn't asked you the question? A. That's right.

Q. You were asked the question whether any force was used on you on this confession and you said, no. That is so; isn't it? A. That's right.

Q. And because you weren't asked the specific question about a threat of force you didn't testify? A. That's right.

Q. And at no time during any stage of the proceeding of these proceedings in any of the courts has there been any claim as far as you know of any threat of force by any police office against you on January 30th? A. I don't know.

Q. That is right, isn't it? A. I imagine so. I don't know.

Q. You are not sure? You testified about asking for a lawyer at that time? A. That's right.

Q. You never made any claim at any time at that hearing or at any time since that you asked for a lawyer when Chief Eagan was there? A. Yes, I did. He said I didn't.

Q. You said you did? A. I said I did and he got on the stand and he said I didn't ask him.

Q. We have here, Mr. Rogers, the transcript of your testimony at that time, and not once does it appear that you claimed to have asked for a lawyer at any time except in the early afternoon. A. I asked when Chief Egan came in.

Mr. ROBINSON. May I object to that?

Mr. ULLMAN. But I am saying—

Mr. ROBINSON. Just a moment, Mr. Ullman. What have you got—the petition?

Mr. ULLMAN. I am looking at the petition, yes.

Mr. ROBINSON. Look at page 45 of the petition where you see, "You never mentioned the name of your lawyer, did you, and to whom?" "Yes, I did." "I thought you said said a minute ago in answer to your counsel's questions you didn't mention the name of your lawyer?" "I didn't name him, but I said I wanted to see a lawyer." Page 45.

Q. On the direct examination when you were requested by your counsel, or questioned by your counsel you stated that you asked for the lawyer only in the early afternoon? A. I told him. I asked Chief Eagan, too, and Chief Eagan went on the stand and said I didn't.

Q. It doesn't appear that you did in the course of your direct examination at any point. At any rate, you have been questioned by police at several different times during the course of your life; isn't that so? A. Yes, two or three times.

Q. More than two or three? A. Two or three times.

Q. More than two or three? A. That's all.

Q. That's all? A. That's all.

Q. Well, you were questioned on the 30th of January; weren't you? A. Yes, that is the same case.

Q. You were questioned on the 9th of January when you were arrested for robbery at the Hotel Travelers? A. That's right.

Q. You were questioned by the police at the time when you went up in November—

Mr. ROBINSON. I beg your pardon. It just occurred to me that I only covered one of these exhibits and I wanted to ask him a few questions, and I am sure I don't want to have you repeat your cross-examination.

With the indulgence of the Court may I ask some questions about the Coroner's statement? I will be very brief.

Mr. ULLMAN. I think, if your Honor please, that that might be deferred until later. I would like to ask him about this.

Q. You were questioned by the police at the time you went up to report that the gun which you used on January 9th and on the date of the murder it was stolen from your nephew? A. That's right.

Q. And you had been arrested before in connection with one or two other crimes and questioned by the police at that time; isn't that so? A. That's right. Not in Connecticut.

Q. What? A. Not in Connecticut.

Q. All right. These were New York officers? A. One was from New York and one was from Connecticut.

Q. And it is so that your brother was an officer of the New Haven police department for a great many years? A. That's right.

Q. Now, you say that the reason that you told of your commission of this crime was because Chief Eagan or Captain Eagan threatened to call your wife? A. That's right.

Q. It wasn't the threat that you are now claiming which you never claimed before? It wasn't the threat that Officer Ruggerio made that caused you to confess; was it? A. No.

Q. It wasn't the fact that your handcuff—or one of your hands were cuffed all the time that caused you to confess; was it? A. No.

Q. It wasn't any persistent or continuous questioning by the police during that day that caused you to tell about your commission of the crime; was it? A. Well, that sort of worried me down, wore me down.

Q. That wore you down? For the first hour no questions were asked of you at all? A. They were supposed to put me in confusion, I suppose.

Q. You supposed that by asking you no questions they were trying to confuse you? A. That's right.

Q. And did that confuse you—asking you no questions? A. I didn't know what I was there for.

Q. Did it confuse you to ask you questions? It didn't confuse you to do that? A. No, it didn't confuse me. It didn't have to confuse me.

Q. What? A. I didn't have to confuse me to ask me questions.

Q. But for the first hour you were asked no questions? A. That's right.

Q. And after the questions began they weren't continuous throughout the rest of the afternoon; were they? A. Yes, directly

one after the other. One would leave and the other would come in.

Q. Didn't you stop to have coffee and a sandwich, a hamburger? A. Yes, and that's all.

Q. And the police brought that to you? A. That's right.

Q. That was along about four o'clock? A. That's right.

Q. You were allowed to smoke; weren't you? A. I had one hand free.

Q. Well, you also had one hand free when you ate the hamburger? A. That's right.

Q. So you had one hand free there on more than one occasion? A. That's right.

Q. And you left the room there, didn't you? A. No. I never went out of the room the whole time I was there until I went home.

Q. Don't you remember that just before, or at the time when the official court reporter came in there about ten o'clock to take the transcript of your testimony that you went out to the men's room and the thing was interrupted? Don't you remember that? A. Yes.

Q. So you were wrong about that? A. Well, I went to the toilet for a couple of minutes, that's all.

Q. That's right. That's right, isn't it? A. That's right.

Q. And then you had coffee again that evening? A. That's right. It was a cup of coffee.

Q. And you were asked whether you wanted anything more than coffee and you said you didn't want any? A. They asked me did I want coffee and I told them, yes. They didn't ask me whether I wanted anything else.

Q. Didn't you hear Chief Eagan say? A. I heard him say a lot of things.

Q. One of them was that you were asked whether you wanted to eat anything and you elected to take just coffee? A. That's right.

Q. And they brought it to you; didn't they? A. That's right.

Q. Now, you say that something was laid on the desk shortly after the questioning began? A. The gun was laid on the desk.

Q. Did you recognize it? A. No.

Q. You didn't recognize it? A. No, not from where it was laying at. It looked like any other gun to me.

Q. But they referred to it as the gun that you had at the Travelers job? A. That's right.

Q. And the gun that you had at the Kennedy job? A. That's right.

Q. And they told you in fact that ballistic tests that very day established— A. They never told me that.

Q. What was it that you told your counsel? A. They told me that ballistic report came down from Hartford and that was the gun that committed the crime in West Haven.

Q. That killed Mrs. Kennedy? A. They didn't say what it did. They said committed a crime in West Haven.

Q. Do you know what crimes that was in West Haven? You know what crime that was in West Haven, don't you? A. I didn't know until after they spoke, told me what it was.

Q. You knew you did it, didn't you? A. I didn't—

Mr. ROBINSON. Just a moment. I object. That is far beyond the scope. We are not trying this case on its merits. It makes no difference what the answer is.

Mr. ULLMAN. If the accused claims he doesn't know what case we are talking about, I think I have a right to ask. At any rate, I won't pursue it any further.

The COURT. The answer may stand.

Q. You had seen that gun more than once before; hadn't you? A. I was supposed to have seen it. If that was the same gun. I was supposed to have seen—if that was the same identical gun. I had seen it before.

Q. On more than one occasion? A. Yes.

Q. And you had even scraped or tried to scrape off the identifying numbers? A. I never did that.

Q. You didn't do that? A. That's right.

Q. At any rate, it was the gun that you saw later on during the course of the trial? A. That's right.

Q. And it was the gun that you had with you the night that you were arrested on the Travelers job? A. I never had no gun.

They took the gun out of the car. I don't know where they got the gun from. It wasn't taken off of me

Q. You put it underneath the seat as the officers approached? A. They said I put it there.

Q. What? A. They said I put it there.

Q. At any rate, you were in the car at the time of your arrest? A. That's right.

Q. The gun was in the car at the time of your arrest? A. So they say. I never saw the gun. They had me up against the car with my hands like this, and the officer came around with the gun in his hand.

Q. That is the gun you used at the Travelers job? You told that to the police—

Mr. ROBINSON. I object to that. We are really getting into a case that isn't even the basis of this particular proceeding. The law is perfectly clear. The only thing in issue here, no matter what the facts may have been, the man's constitutional rights were violated by the occurrences preceding and affecting that confession or those confessions.

Mr. ULLMAN. If your Honor please, I certainly think that it was the devious purpose of counsel in saying that a gun was laid on the table to indicate that that had something to do with forcing a confession, and I want to show that it was really relevant to this inquiry that it was being conducted then, and I want to show that this was a gun that he knew and recognized, was familiar with and had been handling for many times before.

Mr. ROBINSON. Whether it is devious or otherwise, I wanted to explain the circumstances. I have no claim that this gun was used as a threat. I didn't even think of it.

Mr. ULLMAN. I don't know. I think that counsel would have thought of it before, before long, if he saw it in the record.

Mr. ROBINSON. I don't claim there was any effort to use the gun or threaten him with the gun. It was one of the things that was shown to him and I can't see what he did or what he hadn't done with that particular weapon or some other weapon bears on the issues here. I am not afraid that your Honor is going to be prejudiced by that.

We can't try the case that was never tried and it can't even be inquired about to affect his credibility so far as the murder is concerned. I can't prove he was innocent and my friend certainly ought not to be allowed to prove that he is guilty.

Mr. ULLMAN. No claim is made that he is innocent—ever made.

The COURT. You may proceed. I think you have gone far enough with the gun.

Q. So that at the trial before the hearing you never claimed that there was any threat of punching you, and you say you didn't say that because you were not asked? A. That's right

Q. And you say that if for the first hour you were not questioned at all? A. That's right.

Q. And then there was another hour later on that day when you were not questioned at all, that was when Chief Eagan put in the telephone call? A. That's right.

Q. So there were two hours, two full hours when you were not questioned at all? A. That's right.

Q. And when you asked for permission to smoke, you not only were granted permission but one of your hands was released from your cuffs? A. That's right.

Q. And when you asked for something to eat— A. I never asked for anything to eat.

Q. They offered you something to eat? A. That's right.

Q. And when you said that you would like hamburg and coffee you got it? A. That's right.

Q. And later on in the evening when you said you would like coffee, you got it? A. That's right.

Q. Is that right? A. That's right.

Mr. ULLMAN. No further questions.

Mr. ROBINSON. With the indulgence of the Court, may I go into part of my direct which I omitted to cover?

Redirect Examination by Mr. Robinson.

Q. On Sunday at the jail were you visited by any police officers? A. Yes. Around dinner time someone came in. He was a photographer and took a picture of my hands and took a picture of me sitting in a chair near the wall.

Q. That afternoon were you taken down to the Coroner's office by Sheriff Redding? A. That's right, with two keepers.

Q. You made a statement down there? A. That's right.

Q. And the Coroner asked you whether you understood certain things about coroners? A. That's right.

Q. Was the statement substantially the same statement you made the night before? A. Practically the same thing.

Q. Why did you make that statement down at the Coroner's office the next day? A. Because I was afraid if I didn't make it, Chief Eagan would still have my wife locked up and brought down to the courthouse to be questioned, and she was very sick with arthritis.

Q. You hadn't seen counsel between the time you made the statement to the police? A. No.

Q. And if you had been advised by counsel that you should make no statement, would you have made a statement to the Coroner? A. I would have made no statement at all.

Q. If you had been advised by counsel that your wife could not be used as a witness against you for anything? A. I would have made no statement.

Q. Was any counsel allowed, or did any counsel appear with you at the Coroner's office? A. No.

Q. Was there any telephoning in your presence done to locate or bring counsel into the Coroner's hearing? A. No, neither one.

Q. Mention has been made by the State's Attorney to the effect that one of your brothers or your brother was a police officer in New Haven? A. That's right.

Q. Do you know anything about the work of a police officer? A. No. I never had anything to do with it, never talked about it.

Mr. ROBINSON. I believe that's all.

Recross-examination by Mr. Ullman.

Q. You said that you told the Coroner about this killing the following day. I will ask you why? A. Because I was afraid if I changed the story Chief Eagan would still have my wife locked up and she was sick.

Q. You knew you put your wife in the clear by giving the facts

to the police the night before? A. If I contradicted it it would be just the same as if I never gave it to them. That is the way I figured it.

Q. If what? A. If I contradicted the statement it would be just the same as if I never gave it, and they would still have her locked up.

Q. Your wife came down to the trial and testified? A. That's right.

Q. Without assistance, without medication? A. But she had medication home before she came. She had to have it every night.

Q. But she came down without assistance? A. My niece came.

Q. She was there during your trial? A. That's right.

Q. And that was about three months after January 30th? A. That's right.

Q. You didn't ask the Coroner for a lawyer, did you? A. No, because I was refused twice before—three times before.

Q. Do you remember what the Coroner said to you about your right to a lawyer? A. He said I didn't have to say anything unless I wanted to.

Q. And do you remember what he said about a lawyer? A. I don't know exactly what he said.

Q. No, not exactly. A. He said I was entitled to one if I wanted one.

Q. You could have one if you wanted one? A. Yes.

Q. So that you remember the Coroner said to you that you don't have to testify unless you want to, and that you could have a lawyer if you wanted one? A. That's right.

Q. And that is what the Coroner said to you? A. That's right.

Q. He told you, "I want to warn you that you are under no duty to answer these questions if you don't wish to?"

Mr. ULLMAN. If your Honor please, I am now reading from the interrogation of Harold Rogers conducted by Coroner James L. Corrigan at the New Haven County courthouse on the afternoon of Sunday, January 31, 1954 which was marked as State's Exhibit WW, May 14, 1954 at the trial of this accused in the Superior Court at New Haven.

Q. He said this:

"Now, I am going to ask you some questions concerning the case—" After referring to the case of Dorothy Kennedy who was shot in her husband's liquor store in West Haven on the night of November 21 ... "And I want to warn you that you are under no duty to answer them if you don't wish to. Nobody may be forced to give evidence against themselves. I think you are acquainted with that law in a general way. It is also so that you are entitled to be represented by counsel if you wish to. If you do talk to me, you will do so on a completely voluntary basis just because you choose to do it. Whatever you say may be held against you. You may be charged with the commission of some crime as a result of the episode, and if you are so charged I can't promise you any reward or immunity from punishment by virtue of, or for the reason of, you are saying anything you wish to or testifying as you choose to. Do I make myself clear to you?"

And your answer: "I understand."

Do you remember being asked that question?

A. That's right.

Q. Those questions by the Coroner and hearing that statement and your responses I have indicated? A. Yes, that's right.

Mr. CULMAN. No further questions.

Redirect Examination by Mr. Robinson

Q. Despite these pronouncements by the Coroner as to who he was and that you could be represented by counsel if you wished to, you made the statement for what reason? A. On account of the telephone call the night before.

Q. Do you recall whether the Coroner, before he asked you any questions, put you under oath? A. Yes.

Q. Do you remember him saying, "Do you solemnly swear to tell the truth and nothing but the truth so help you God?" A. I don't remember.

Q. Do you remember holding up your right hand and being sworn? A. That's right.

Q. Before he told you about not having to make a statement? A. That's right.

Q. And not have to answer questions? A. That's right.

Q. Anything else? A. He asked me did I know what a Coroner was, and I told him to tell whether a person is dead or alive.

Q. He also told you that he understood you confessed to the police? A. That's right.

Q. That was before you answered any questions? A. That's right.

Mr. ROBINSON. That's all.

Mr. ULLMAN. No further questions.

(Witness excused.)

Mr. ROBINSON. I think that is my case on the evidence, if your Honor please.

Mr. ULLMAN. I didn't hear that.

Mr. ROBINSON. That is all I have to offer in the way of evidence.

Mr. ULLMAN. Can I have two or three short witnesses?

The COURT. Yes.

ROBERT J. MULKERN, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

By the Clerk:

Q. Your name, please? A. Robert J. Mulkern.

Q. And where are you from? A. Detective, New Haven Police Department.

Q. You are an officer of the New Haven Police Department? A. I am.

Q. And as such on January 30, 1954 did you participate in the investigation of the Kennedy murder? A. I did.

Q. Were you present at the New Haven County Courthouse on that afternoon? A. I was.

Q. And evening? A. Yes.

Q. It has been testified here that Harold Rogers, at some time during the course of that afternoon asked you to get him his lawyer or notify his lawyer or asked if he could see his lawyer and talk to him. Did that happen? A. It did not.

Q. Did he at any time ask for a lawyer? A. To my knowledge he never did ask for a lawyer.

Q. Were you present during most of that afternoon? A. I was present throughout that afternoon and evening most of the time.

Q. And he states specifically that he asked you if he could see his lawyer and you said that did not happen? A. That did not.

Q. Can you tell me whether during such questioning as there was Rogers that afternoon—whether he was seated at all times? A. Rogers was seated at all times with the exception of the time when he got up and went to the bathroom. Then also during the time his cuff was released from the chair to have a sandwich, and I don't recall whether he stood up at the times. He seems to me that he did, but I am not positive.

Q. You think that he may have gotten up at that time also? A. Yes.

Q. And the chair that he was seated in, was that an arm chair? A. It was a chair similar to this.

Q. In other words, would you say that it was a comfortable chair? A. Yes.

Q. And were both of his wrists cuffed during the entire time? I think you said that wasn't when he was feeding. Perhaps you might elaborate on that a little bit? A. His wrists were cuffed when he was removed from the jail, and then shortly after his arrival into the State's Attorney's office his right hand only was cuffed to the chair and he had freedom of his left hand.

Q. For how long did that continue? A. Throughout the rest of the day.

Q. Throughout the rest of the day. So that he had one hand free from the handcuffs throughout the rest of the day and the other one attached to the arm of the chair? A. And during the period of eating the handcuff was released from the chair and left dangling on his wrist.

Q. So during that time both of his arms were free? A. That's correct.

Q. Now, he seems to testify that except from the first hour when he was brought down, and for another hour during the evening, that he was continuously and persistently questioned. What do you have to say as to that? A. That is not true. He was questioned periodically throughout the day. He was questioned by Detective Ruggerio, and he was questioned in the be-

ginning by Captain Wilson and Lieutenant Harvey of the West Haven police department.

Q. So that the questioning was not continuous? A. It was not.

Q. And when he indicated his readiness to tell of his participation in the crime, was his statement taken by an official court stenographer? A. It was.

Q. Robert Lyman? A. That's correct.

Q. Did you at anytime hear anybody, perhaps particularly Detective Ruggerio, make any threat against the accused? A. I did not.

Q. Would you say that that did not happen? A. I would say it did not happen.

Q. Did you during the course of the trial see Mrs. Rogers in attendance? A. I was not in attendance.

Q. Did you see Mrs. Rogers then at any time in the course of the investigation? A. Yes.

Q. Was she able to get around? A. She was.

Q. Without help and assistance? A. Yes.

Mr. Ullman: You may inquire.

Cross-examination by Mr. Robinson.

Q. You didn't testify in the trial? A. I was in the hospital at the time.

Q. Didn't you go out to Mrs. Rogers house while the investigation of this charge upon which he was arrested was going on and talked to Mrs. Rogers? A. The robbery charge?

Q. Yes? A. I did.

Q. Didn't you find her in bed then? A. I don't recall that I found her in bed on my arrival. I know that she was up and around the house during the time I talked to her.

Q. She told you that she couldn't get about without somebody to take care of her? A. I don't recall her saying that to me.

Q. You knew she was sick? A. I knew that she had been sick, yes.

Q. And you knew that on the afternoon of the 30th when you had Rogers down during the interrogation? A. I would say I had knowledge that she was sick at the time I talked to her.

Q. You called in Chief Eagan to come to your help in that interrogation? A. I wouldn't say that.

Q. Did you read his testimony? A. I wasn't in the courtroom.

Q. Did you read his testimony to that effect? A. No, I did not.

Q. You heard him make these fake telephone calls; didn't you? A. I did not.

Q. You weren't there? A. I was not in the room at the time.

Q. Did you know that he made them? A. I have read about it in the paper since.

Mr. Ullman. I have heard of one only, if the Court please. I don't think that counsel is exactly right in saying that there were fake telephone calls. There was one.

Mr. Robinson. Well, one in a threatening gesture. To make the other one—to complete it. That is all I mean.

Q. How much of the afternoon were you there? A. A good deal of the afternoon.

Q. How much? A. Probably four hours.

Q. Were you asking questions when you were in there? A. At times.

Q. Well, most of the time you were in there with him and you were asking questions, weren't you? A. At times, not most of the time. Other times I would be listening.

Q. Others were questioning? A. That's right.

Q. And that took at least four hours of the afternoon, that is your listening and your asking questions? A. That was not continuous questioning.

Q. What do you mean by continuous questioning? A. I would mean by continuous questioning starting and continuing questioning until the time that you stopped, which would be, four or five hours later. It did not occur in that way. Mr. Rogers was questioned by me for a period of time, and then a period of time would elapse when no one would be talking to him, and then someone else would talk to him.

Q. Wasn't it so that you would ask him a question and then there would be a conference in his presence or outside, and someone would come back in and the interrogation would go on? A. It is not so.

Q. Well, you tell me what happened then more in detail than you have. A. I don't think I can give you more detail than I have. He was questioned by me with reference to the crime which had been committed and what his participation in it was.

Q. You wouldn't have let him see a lawyer if you had anything to do with it, would you?

Mr. ULLMAN. I object to that. It is a hypothetical question.

Mr. ROBINSON. The man had partial custody of the accused.

Mr. ULLMAN. I object to it.

The COURT. Overruled.

Q. You wouldn't have let him see a lawyer if he asked for one and you heard him ask for one; would you? A. I don't know whether I would have or not at the time.

Q. You know you wouldn't? A. I don't know whether I would have or not at the time, Mr. Robinson.

Q. Don't you know that what you were doing with the man that afternoon was to get him away from any advice and counsel and see what you could get out of him by at least interrupted questioning that lasted from twelve o'clock in the afternoon when he got in there until nearly one o'clock the next morning?

Mr. ULLMAN. Object. It is a double or triple question.

The COURT. Overruled.

A. I thought what I was doing that afternoon was investigating a crime of murder and questioning him about it.

Q. And you thought you were justified in doing anything that was done there because it was a crime of murder; is that correct? A. I thought I was justified in questioning him.

Q. Did you think you were justified in keeping him from talking to a lawyer? A. I didn't—

Mr. ULLMAN. Object. It doesn't appear that that was done.

The COURT. Sustained.

Q. You knew at the time that I had appeared for him at the City Court on the charge upon which he was being held at the jail?

Mr. ULLMAN. I object. It is irrelevant.

The COURT. Overruled.

Q. Didn't you? A. I was of the belief that Mr. Corse had represented him.

Q. You knew Mr. Corse and you have known both of us for years as being associated together? A. That's correct.

Q. And you knew that in the years that we have known each other there have been many times when you wanted to talk to clients that you asked me to let you do it?

Mr. ULLMAN. I object to that. I think we are only interested with what happened here.

The COURT. The objection is sustained. We will recess until two o'clock.

Afternoon Session.

ROBERT J. MULHERN, resumed the stand, testifying further as follows:

Cross-examination Continued by Mr. Robinson.

Q. Sergeant—are you still a sergeant? A. Lieutenant.

Q. Lieutenant. You go up so quickly that I can't keep track of the situation. I hope I won't forget that.

You know, don't you, in your long years of police work that in police interrogation it is sometimes much more effective in extracting information from a suspect to indulge in pauses between questions?

Mr. ULLMAN. I object to that, if your Honor please. What materiality is that? According to the petition, it is claimed that there was continuous and persistent questioning throught that day. The witness has said there was no such process.

Mr. ROBINSON. It seems to me that is spliting hairs for the reason that an interrogation is measured generally by its two ends, what takes place in the meantime is a part of the interrogation and certainly the evidence sustains the claim that there was an interrogation that started in the afternoon and went into the night. And the matter before the Court is what effect the interrogation had on the mental operations of the Petitioner.

The COURT. The objection is overruled.

By Mr. Robinson.

Q. Do you remember the question, or would you like to have it read? A. I would like to have it read.

(The pending question read.)

A. I would say, yes, sometimes.

Q. And it is also well recognized, isn't it, that to put a suspect in the presence of, or in a position where he can see certain objects which are suspected or thought to have relation to the matter under investigation, that simply to leave him there and let him look at these things, whether it is a gun, a bloody cloth or something of that kind, often produces the effect that the police investigation is after?

Mr. Ullman. I object to that. That asks for some psychological analysis, or some psychological processes that I don't think is appropriate at this time. I suppose it could easily be well asked whether if the gun were not shown to him that that would be unfair to him. Here counsel in effect is asking whether showing him the gun was something unfair.

Mr. Robinson. I am not asking whether it is unfair or not. The evidence has been brought in that there was interruptions of the interrogation, perhaps to show, or the claim will be made that the pressure was put on and then it was relieved, and the man was thereby allowed to recover his poise and, therefore, although the length of time was great, that the effect was not continuous, and I don't think that it is an unfair position to develop what the purpose was of these various steps that have been testified to in an effort to take whatever weight there may be involved in the bare statement of the length of time that the interrogation took place.

The Court. The objection is overruled.

A. Well, the only way I can answer that would be my opinion of what that would do, leaving the gun—

Q. Let's leave it out. Isn't that a device that you know to be used in interrogation? A. I'll say that it could be used but it wasn't used by me for that purpose.

Q. Was this device used by you for this purpose or for any purpose in interrogating Rogers? A. No, it was not.

Q. Were you in charge of the investigation or was Wilson from West Haven in charge of the investigation? A. Captain Wilson from West Haven would have been in charge of the investigation as the crime was committed in their jurisdiction.

Q. Who was giving the directions as to what should be done in reference to this interrogation? A. I don't think there was any directions given at that time.

Q. Was each officer who was present there doing whatever had occurred to him to do on his own? A. As far as I know, yes.

Q. These interruptions were not made in the interrogation with any idea of giving Rogers a breathing spell; were they? A. No.

Q. And didn't the interrogation take the form, so far as you observed it, of making accusations against him such as he has testified to? In effect, "You did it and you know you did it"? A. I wouldn't say that.

Q. Was that sort of address ever applied to him in your presence? A. Not to my knowledge.

Q. Was he ever told by anybody in your presence that he was lying when he said he didn't do these things? A. Not that I recall. He could have been told that. I could have told him that myself.

Q. You mean you could have told him that and forgotten about it? A. It is possible. That was my impression at the time I was talking to him.

Q. So you may have told him and not now remember it? A. That is possible.

Q. And he may have said things to you that you do not now remember; isn't that so? A. Possibly.

Q. On any occasion did you say to him, "Now, have you got a lawyer?" A. I didn't say that to him, no.

Q. May you have said it and forgotten it? A. No.

Q. You think that the subject of a lawyer would be something you wouldn't forget? A. I knew that he had a lawyer, Mr. Robinson.

Q. Did you make any effort to get in touch with that lawyer? A. I did not.

Q. You knew that he had been represented, and represented by

Mr. Corse and myself; didn't you? A. I knew that he had been represented by Mr. Corse.

Q. Did you ask him whether he wanted to take the advice of Mr. Corse on the matters that you were asking him about, or anything on that occasion?

Mr. ULLMAN. Object, if your Honor please. There is no duty upon this witness to have asked such a question.

Mr. ROBINSON. I asked him whether he did.

Mr. ULLMAN. And there is no occasion on an occasion such as this for an accused to have counsel present.

The COURT. The objection is overruled.

Q. Can you answer the question? Do you want it read? A. May I have it read.

(The pending question was read.)

A. I did not.

Q. Now, isn't it so that if he had asked for his lawyer, or even Mr. Corse by name, you would not have communicated with him in view of what you said this morning?

Mr. ULLMAN. I object to that—it is purely hypothetical. If something had happened would he have done something.

Mr. ROBINSON. It bears on the circumstances in which this man was held.

Mr. ULLMAN. We are only interested in what did or didn't happen, not what might have happened if something else had happened.

Mr. ROBINSON. May I address myself for a moment to the Court? As I understand it, the claim is now going to be made that on the basis of the officer's testimony and perhaps Officer Ruggerio, that there is significance to the fact that they said there was no request made. Now, if it appears from the evidence that a request would be simply an idle gesture, it has some bearing on whether or not there has been any voluntary sacrifice of the man's position.

The COURT. The objection is overruled.

The WITNESS. Will you repeat the question.

(The pending question read.)

A. I don't feel that I can answer that question, Mr. Robinson. I don't know what I would have done if I were asked by him.

for a lawyer. I probably would have consulted someone else and advised him of what he had told me or requested.

Q. Who would you have consulted, Lieutenant Mulhern—would you have consulted Chief Eagan? A. Well, Captain Wilson who was in charge at the time, or possibly some lawyer who was working on the side of the State.

Q. Was there a lawyer working on the side of the State there at that time—that night? A. You mean—

Q. That afternoon or night? A. Yes, I believe there was.

Q. Who? A. I believe Mr. Gorman stopped by in the afternoon.

Q. But you wouldn't have of your own initiative without being told by somebody working for the State on the side of the prosecution, I assume you mean? You don't include the Public Defender in that; do you? A. I don't think I would have asked you, Mr. Robinson, whether or not I should call a lawyer.

Q. As a matter of fact, you were doing everything that you could to keep the knowledge of what was going on from me and Mr. Corse; weren't you? A. I wouldn't say that. We didn't even consider you at the time, Mr. Robinson.

Q. Did you call Chief Eagan? A. I did.

Q. Now, I have his testimony here, and just to refresh your memory do you recall that you in the first place called him and asked him to come in to interrogate Rogers? A. Yes, I did.

Q. And do you recall that you told him that both you and Captain Wilson and Lieutenant Harvey needed some help? A. I don't recall the exact words I said to him, Mr. Robinson. I know that I called him and asked him to come in to assist in the interrogation.

Q. Didn't you tell him that you had been able to get nowhere with Rogers at the time you made that call?

Mr. Ullman. May I know whose testimony you are reading from?

Mr. Robinson. Captain Eagan's testimony.

Mr. Ullman. All right.

Mr. Robinson. I am going to offer these pages later on anyway.

Q. Up to the time that you called Captain Eagan there had been no admissions made by Rogers at all, had there? A. Yes, there had.

Q. There was no stenographer present at any of the interrogation until after Chief Eagan had called him? A. That's correct.

Q. And at the time you called Eagan, you yourself had been out at the Rogers' house and see Mrs. Rogers about this other investigation some days or weeks before, hadn't you? A. I had.

Q. And hadn't you interrogated her on those occasions? A. Interrogated her?

Q. Asked her questions.

Mr. Ullman. You mean about some other case?

Mr. Robinson. I don't know just what it is, just whether he hadn't interrogated her.

Mr. Ullman. You mean about some other case?

Q. The other case from which Rogers was held in jail at the time he was taken down to the courthouse? A. Let's say I interviewed her in regard to the robbery.

Q. You had more than one interview, didn't you? A. Only one that I recall.

Q. And didn't you ask her to come down and talk to you or ask her for another interview, and weren't you told that she had consulted with me and she had nothing further to say? A. Vaguely I remember an instant of that.

Q. And then you made no further effort to talk to her? A. Possibly not.

Q. Was that the reason you say you were not—I will withdraw that. Was that the reason you say you would not have communicated with me in any event if Rogers had asked for his lawyer?

No, I didn't say that, Mr. Robinson, that I wouldn't communicate with you.

Q. I though you said a moment ago you would have talked to somebody representing the State? A. I said I wouldn't go to you to ask you for advice on whether or not to call a lawyer for Mr. Rogers.

Q. That is because probably you think I am very prejudiced against any prosecution; isn't that so? A. No. I don't think it would be wise on my part to ask you for advice of that nature.

Q. You knew that you couldn't ask me that without disclosing the fact that my client had asked for me and was being held in the position where you were wondering whether he ought to have his lawyer? A. That is absolutely wrong.

Q. Well, why wouldn't you? A. To my knowledge while I was present your client never asked for you or any other lawyer.

Q. Did you talk to Chief Fagan or Assistant Chief Fagan before he went in to interrogate Rogers? A. I believe I did.

Q. Did you tell him what you knew about the physical condition of Mrs. Rogers? A. No.

Q. Didn't you tell him that you had seen her at her home and that she was at last claiming to be sick? A. No.

Q. Did you tell him that you had interviewed her in her night-gown with a robe thrown over it when you went out to her house? A. No.

Q. Did you tell him that you had tried to get her to come down to headquarters to talk to you and she said she was so ill she couldn't come out? A. No.

Q. So that if he had any knowledge of her condition it didn't come from you; is that correct? A. That's correct.

Q. Did you tell any such thing to Wilson? A. No.

Q. Or to Harvey? A. I don't recall telling that to anyone, Mr. Robinson.

Q. You knew at the time, though, that she at least claimed to be sick? A. I knew that she claimed to be sick at the time that I talked to her at her home during the time that she was up and about the house.

Q. You saw the children there? A. There was one child there and the other child was with some other relative.

Mr. Robinson. That's all.

Redirect Examination by Mr. Ullman.

Q. So that at no time during the course of that day did Rogers ask for a lawyer or talk about a lawyer; is that right? A. In my presence while I was there at no time.

Q. And he has said that he asked you for a lawyer and you say that that did not happen? A. That did not happen.

Q. And you heard the accused or Rogers testify this morning? A. I did.

Q. That Chief Eagan testified that he was not asked by Rogers for a lawyer at the trial? A. I did.

Q. Is that right? A. Yes.

Q. Now, counsel in referring to these intervals between questioning on the 30th said something about a breathing spell for Rogers. Was there any indication to you from the course of the questioning or from anything else that Rogers required any breathing spell? A. No, sir.

Q. Between questioning? A. No, sir.

Q. What was his manner throughout the course of the afternoon—was he hurried—did he take his time in answering—was he sitting back in the chair? A. Mr. Rogers was sitting back in the chair and his answers to questions put to him were not hurried and Mr. Rogers acted in a natural way, his speech wasn't fast, his reaction to questions wasn't fast.

Mr. Ulman. No further questions.

Recross-examination by Mr. Robinson.

Q. Well, most of all that he said that afternoon was that he didn't know anything about it and didn't do anything? Wasn't that so over and over again? A. He did say at some time during the questioning that he didn't know anything of it and that he didn't do anything.

Q. He kept saying that over and over again? A. I say that during the questioning, during the time when I questioned him in the beginning and in the afternoon he said that he didn't know anything about it, but then later on he admitted that he did know where the store was and that he did know the woman.

Q. You didn't have any stenographer there during all that afternoon; did you? A. No.

Q. There is no record made of what he said or what you said all during that afternoon until after Chief Eagan got in there and had a stenographer sent for? A. That's correct.

Q. There was no recording of it—nobody took any notes? A. No.

Q. As far as you know you have to rely entirely on your memory for everything up to the time that this written statement was being jotted down? A. That's correct.

Q. Now, you say you don't know anything about what happened between Chief Eagan and Rogers? A. At the time it was happening?

Q. Did you hear anything or see anything of what transpired between Rogers and Eagan? A. You mean on that evening?

Q. On that evening when he cracked, or whatever you call it? A. I wasn't present at the time when he first gave information as to his actions. I wasn't present.

Q. Where were you? A. I was in another room in the same office.

Q. Were you present when any statement was given? A. I was.

Mr. ROBINSON. That's all

Redirect Examination by Mr. Ullman.

Q. It is so, is it not, that even before the 30th of January Rogers had admitted stealing this gun from the home of his nephew at a time shortly before the murder of Mrs. Kennedy?

Mr. ROBINSON. I object to that. What bearing has that got on the matter in issue here? I claim it has none.

Mr. ULLMAN. Well, it was claimed here that these confessions were as a result of coercion what happened on the 30th, the 31st of January. I think we are entitled to show that at least a portion of these confessions had come in when these influences, adverse influences so-called of January 30th were not in fact operating. This was before he was even suspected of the Kennedy murder.

Mr. ROBINSON. May I also add the other objection which I have, and that is— is this some other time and place where these things happened?

M. ULLMAN. That's right.

Mr. ROBINSON. May I ask that the question include those so that we will know what we are talking about? It is a general question.

Mr. ULLMAN. Ask a question of whom? Me or the witness?

Mr. ROBINSON. Let me withdraw the comment. I think the question should specify when and under what general circumstances these other statements were made.

The COURT. The objection is overruled.

Mr. ULLMAN. Will you read the question.

(The pending question read.)

Mr. ROBINSON. May I object to that as leading. This is Mr. Ullman's own witness and it certainly calls for a yes or no answer, and it has a great deal of material in it—

The COURT. It is leading. Sustain the objection.

Q. Do you know whether Rogers had made some statement? A. I do.

Q. With respect to this gun on some previous occasion? A. I do.

Q. And do you know about when that previous occasion was? A. Yes, I do.

Q. Can you tell us? A. Well, the night that Rogers was picked up I believe was October 9th or 10th. I was one of the officers who picked him up.

Q. What did you say—October? A. I don't recall the exact date.

Q. Do you know when it was with reference to— A. It was shortly before—

Q. Can you fix the date?

Mr. ROBINSON. I will agree it was January 9th.

The WITNESS. January 9th.

Q. And can you fix it with reference to the date of the robbery or attempted robbery at the Travelers Hotel? A. It was the same day, the evening of the same day that he was arrested and on the following day he gave a statement of admission that he had taken this gun from the home of—

Mr. ROBINSON. I object to that. The statement will be the best evidence if it was taken. I assume it was taken in writing.

Q. Did he make a statement? A. I was present at the time it was taken, at the time he made the statement of admission where he had taken this gun.

Q. Taken this gun from where? A. Taken this gun from his niece's home.

Q. His niece you say? A. Yes.

Q. When was the time that he claimed to have taken it with reference to the Kennedy murder?

Mr. ROBINSON. I still urge the objection that if there is a statement of that kind the best evidence would require its production, although I don't want to be too technical about it. It would seem to me that that would be the only safe way to proceed.

Have you got it here, Mr. Ullman? Have you got that statement?

Mr. ULLMAN. Not with me, no. I don't think that it is essential by any means if the officer heard him make a statement. I am only asking him what he heard him say; I am not asking him for the contents of the statement. I am not relegated to the necessity of just proving it alone through the statement.

The COURT. The objection is overruled.

Mr. ULLMAN. Will you read the question.

(The pending question read.)

A. It was on the night before the night of the Kennedy murder.

Q. Now, do you know whether before making that statement which you just testified to he had made a different statement? A. He did.

Mr. ROBINSON. Well, I object to it. It is certainly going into collateral matters that haven't anything to do with the Kennedy murder.

Mr. ULLMAN. I don't propose to go any further. The question has been answered. Is there any objection?

Mr. ROBINSON. Not to your stopping, no.

Mr. ULLMAN. Well, I have proved what I want to prove, that he made a different statement. I am finished. No further questions.

Recross-examination by Mr. Robinson.

Q. You claim that at one time he claimed he won the gun in a crap game? A. That's right.

Q. These other matters that he was being interrogated about

I suppose were under the circumstances where it was claimed that the gun that you were talking about was the gun that was in his possession or in his automobile; is that so? A. I don't follow that question.

Q. Let me start over again. You were talking to a man in whose automobile you claimed to have found the gun? You claimed that the gun was found in Roger's automobile; didn't you? A. Correct.

Q. And all you were concerned about was where the gun came from at that time? You were not investigating the Kennedy murder; A. We were investigating a robbery at the Travelers Hotel.

Q. And his statement to you, so far as you testified to it, concerned only where the gun came from; is that correct? A. The statement?

Q. You told me that at one time you said he won the gun in a crap game? A. Yes, sir

Q. And then was it later or after that he said he got the gun from his niece's house? A. It was the following day.

Q. I mean was the crap game the first statement and the niece's house the second statement? A. That's right.

Mr. Ullman. That's all.

(Witness excused.)

Lawrence Ruggiero, called as a witness on behalf of the Respondent, being first duly sworn, testified as follows:

By the Clerk.

Q. Your name, please? A. Lawrence Ruggiero.

Q. And where are you from? A. New Haven Police Department.

Direct Examination by Mr. Ullman.

Q. You were an officer of the New Haven Police Department assigned to the Detective Bureau? A. Yes, sir.

Q. And were you such on January 30, 1954? A. Yes, sir.

Q. And were you present that day during the questioning of Harold Rogers at the State's Atorneys office? A. Yes, sir.

Q. Did you participate in the questioning at all? A. Yes, sir.

Q. You did? A. Yes.

Q. Now, it has been testified by Mr. Rogers here that he asked you to get his lawyer. Did he do that? A. No, sir.

Q. Did he at any time ask for a lawyer? A. No, sir.

Q. You or anybody else? A. To my knowledge no one else either.

Q. Did he talk about getting a lawyer? A. No, sir.

Q. Did he make any reference whatsoever to a lawyer? A. No, sir.

Q. Now, for the first time during the course of all of these proceedings we have heard Rogers testify that you threatened to punch him. Did you hear that testimony this morning?

Mr. ROBINSON. I object to the assumption in the question.

Mr. ULLMAN. Assumption? Which is the assumption?

Mr. ROBINSON. That for the first time he heard today.

Mr. ULLMAN. For the first time any of us heard.

Mr. ROBINSON. Are you testifying now, sir. I object to the form of the question.

The COURT. Sustained.

Mr. ULLMAN. I claim it, if your Honor please. Does counsel claim that it was ever brought into the case at any time before? If so, let him say so.

Mr. ROBINSON. I am not under the direction of my Brother.

The COURT. The objection is sustained.

Mr. ULLMAN. I am not directing you.

What was your Honor's ruling?

The COURT. The objection is sustained—the form of the question.

Q. Did you ever hear at any time during the course of these proceedings any claim made by the accused or anybody in his behalf that he was threatened at any time on January 30th? A. No, sir.

Q. Was that claim ever made? A. No, sir, it never was.

Q. Did you hear the accused make it for the first time today? A. Yes, sir.

Q. And that was the first time that you heard it? A. Yes, sir.

Q. Did you threaten him? A. No, sir.

Q. Did you hear anybody else threaten him? A. No, sir.

Q. And did you hear him testify in the Superior Court in New Haven on the preliminary hearing on the admission of the confession? A. Yes, sir.

Q. Did he at any time make any statement about a threat of force or any kind of threat? A. No, sir.

Q. During the course of that afternoon and evening as matters progressed, did the officers do some investigating of matters that would come up during the course of the questioning? A. In what respect, sir?

Q. I mean was the questioning from time to time broken off? A. Yes, sir.

Q. For purposes of consultation among the officers? A. Yes.

Q. And for checking certain matters that arose during the course of the discussion? A. Yes, sir.

Q. And on those occasions would the questioning of Rogers cease? A. Yes, sir.

Q. And did that happen more than once during the course of the afternoon? A. Yes, sir.

Q. Were you present at all times from the beginning when Rogers was brought down right through to the time when Chief Eagan came in? A. Yes, sir.

Q. You were? A. Yes, sir.

Mr. UELMAN. I think you may inquire.

Cross-examination by Mr. Robinson

Q. Did you hear these telephone calls about bringing Rogers' wife down? A. No, sir.

Q. Yet you say you were there all the time when Chief Eagan was there? A. I said up until the time Chief Eagan arrived.

Q. Then you disappeared or went out? A. I went into another room.

Q. And left him alone in there; is that right? A. He wasn't alone.

Q. What? A. He wasn't alone in there.

Q. You don't know whether he asked Chief Eagan to get his lawyer; do you? A. No, sir.

Q. You testified here that he never made any request of any of the officers? A. At the time I was there I didn't know anything about it. I was told that he never asked for any lawyer or anyone.

Q. You knew that I represented him when you arrested him in that City Court matter? A. Yes, sir.

Q. Your name appears on the Exhibit A; doesn't it? A. Yes.

Q. Now, you were asked by Mr. Ullman whether you threatened him with any physical violence, and you said you didn't? A. That's right.

Q. Do you mean to say that you didn't express a wish that you could strike him in the face? A. No, sir.

Q. You never did that? A. No.

Q. You never do that? A. No, not when I am looking for information.

Q. Are you sure about that? A. Positive, sir.

Q. And you didn't hear any officer that day looking for information make such a statement? A. No.

Q. Isn't it a common thing in your police experience when you don't get the information from some suspect to tell him in, let's say not soft language, that he is a liar and that he should be treated in such and such a way? Have you ever heard any such thing?

Mr. ULLMAN. I object to that. We are concerned only with what transpired here.

Mr. ROBINSON. I am examining as to credibility.

Mr. ULLMAN. Object.

The COURT. Overruled.

Q. Have you heard any such thing as that? A. No, sir.

Q. Never in your police experience? A. I heard of it but we never use that practice in the New Haven Police Department.

Q. How long have you been a member of the force? A. I am a member of the force for ten years, sir.

Q. Did you hear any of the telephone calls of Chief Hagan? A. No, I didn't.

Q. Do you know what he was going to do? A. No.

Q. Had you any knowledge that Mrs. Rogers had been sickly for a while? A. No.

Q. Had you been out investigating this robbery matter that you arrested him on? A. Yes, sir.

Q. Did you go to the Rogers' house? A. No, sir.

Q. Did Officer Mulhern take over from you in the investigation or did you continue on the investigation? A. Well, I went home, and after I went home that night when he was apprehended, Mulhern was working at the time and he took over the investigation.

Q. Do you remember what part of the interrogation you conducted yourself? A. No, sir. It was just in that random interrogation.

Q. Firing a question here and there when somebody else wasn't talking to him; is that correct? A. That's correct.

Q. You didn't ask him two questions at once or anything of that sort? A. Oh, yes.

Q. You did? A. Possibly, yes.

Q. It would continue with two men firing questions at the same time? A. No, I didn't say that. I could have possibly asked him two, three, four, five questions in rotation, sir.

Q. Do you recall him being brought in and sat down with the gun out on the table? A. Yes, sir.

Q. Was he left there in the presence of that gun for some time? A. Yes, sir.

Q. And that was done with a purpose; wasn't it? A. No, sir.

Q. Was it done because nobody had thought of any questions to ask him? A. To be honest with you, I don't know.

Q. I wish you would, I really wish you would. A. I don't know.

Q. You don't know? A. No.

Q. But it was done anyway, wasn't it? A. That's right.

Q. He was handcuffed in a chair and the gun was put out on the table—by you, was it? A. No.

Q. Who? A. Well, the gun was in the possession of Mr. Holtz, I believe.

Q. So Rogers is correct apparently. He says that the County Detective produced the gun? A. It could be.

Q. Do you remember him doing that? A. I don't remember him specifically, but I know he had possession of the gun.

Q. Did you see somebody other than Rogers pick the gun up and put it on the table? You think it was Holtz? A. Yes.

Q. And then did silence reign there for awhile? A. Yes, sir.

Q. I think the question was asked of you because I remember looking at something when the question registered in my mind. You said that you would go out and confer and investigate and then come in again? By referring to "You," I am referring to the officers. Was that the way it was continued? A. Yes, sir.

Q. That is quite a usual police procedure to keep a line of pressure on a suspect; isn't it? A. Not necessarily.

Q. Well, isn't it so as a matter of fact? A. No, it isn't so.

Q. You ask him questions, you get nowhere, and you go out, and you say: "Well, now, let's see what we will do. We have got him to say this, or we haven't got him to say that," and then you run out and get something and make an investigation? A. That's right.

Q. And then come out with that new material and go at that suspect again from a new angle? A. That's right.

Q. That is a form of pressure to extract a statement from the individual under investigation; isn't it?

Mr. ULLMAN. Object to that. I think that is for the Court to say.

Mr. ROBINSON. I think so. I will withdraw the question.

Q. Was that done on this occasion?

Mr. ULLMAN. Object.

The COURT. Overruled.

Q. Is there something about me that is funny? A. No, sir.

Q. I beg your pardon. Would you tell me whether that was done on this occasion? A. Not necessarily, no. It wasn't done.

Q. When you say "not necessarily," does that mean you don't want to answer, or you don't remember, or what does it mean? A. It means that there was no pressure exerted on the subject in that answer.

Q. You were all trying to get a statement out of Rogers? A. That's right.

Q. And when you got the statement after midnight and had it signed and sworn to, you then all went home; didn't you? A. Correct.

Q. Will you tell me, sir, that you didn't say in some part of

the time that you were there. Now, look, why don't you confess to this and let's go home?" A. Maybe I did say it.

Q. Don't you remember whether you did? A. No, I don't remember it.

Q. You were putting your own personal convenience up to the man suspected of murder as a reason why he should give a statement against him; weren't you? A. It could be possible.

Q. Will you tell me that that was not pressure of a very satisfactory kind perhaps? You had no reason to believe that he wanted to see you snugly in bed; did you? A. I didn't see no reason for that. I don't think that a man would confess to murder just to see me go home and go to bed.

Q. I don't think so. I don't think so either unless you were doing something to him. You weren't doing anything to him; were you? A. No, I didn't use any strenuous accusations or anything.

Q. What do you mean by strenuous accusations? A. As you claim it, sir, the interrogation consisted of something—what is going on.

Q. Was it as strenuous as I am being with you? A. No, it wasn't.

Q. And was it as much to the point—I will withdraw it. Did you on any occasion tell him that he was lying when he said he didn't do it? A. I have learned in interrogations that to tell a person that he was lying would set me back, and I very seldom use the word "liar."

Q. Have you got another word that means the same thing? A. Not telling the truth, or telling an untruth.

Q. Did you say to him on that occasion, "Look, my friend, you are telling an untruth?" Did you say that to him? A. I possibly could have

Q. Well, don't you remember? A. When you sit down and interrogate a person at random, you din't remember the exact words or phraseology that you use.

Q. You remember what he says to you, everything he says to you or doesn't say to you? A. I try to, yes.

Q. You made no notes on that occasion? A. No.

Q. You didn't make a note to the effect that he said this or that at any particular time; did you? A. No.

Q. Up to the time Chief Eagan got there the investigation had been productive of nothing of value; isn't that so? A. That's right.

Q. And after Chief Eagan got there then the whole picture changed; is that correct? The whole show wound up very quickly and you got the stenographer in? Where was the stenographer waiting, or did you go and get him? A. I don't know where he was, but I know we had to call him up at his home.

Q. Well, in other words—

Mr. ROBINSON. That is belaboring the point. I think that is all. Well, just a moment.

Q. By the way, you weren't sick at the hospital during the trial? A. No.

Q. You sat all during the trial because you testified as to who testified and who didn't? A. I didn't sit through the entire trial, sir.

Q. There was no reason why if you had been called by the State's Attorney you couldn't have testified? A. That's right.

Mr. ROBINSON. That's all.

Redirect Examination by Mr. Ullman.

Q. As I understand you, at some time after Chief Eagan got there Rogers indicated that he was ready to tell the truth? A. Yes.

Q. Then the proceedings were stopped and the Court Reporter was called up at his home and asked to come? A. Right.

Q. And then on his arrival this Exhibit VV, interrogation of Harold Rogers by Assistant Police Chief Raymond J. Eagan was transcribed? A. That's right.

Q. Typed up, taken on notes? A. Yes.

Q. Then it was taken on notes by a stenotype machine? A. No, free hand, shorthand.

Q. And this confession of July 30th, statement to Chief Eagan, consists of thirty pages, Exhibit VV? A. Yes.

Q. And at the conclusion of it there is a notation that the

aforesaid Harold D. Rogers thereupon made oath to the truth of the foregoing statement before me, Robert R. Lyman, a Notary Public in and for the State of Connecticut; is that so? A. Yes.

Q. So that you heard the accused testify that Chief Eagan gave him an hour to decide whether to tell the truth, and then as Chief Eagan started to put in a telephone call he then said that he would tell the truth? A. I wasn't present in the room then.

Q. But you heard him testify to that this morning? A. That's right.

Q. So that after he gave some apparently oral statement, the Chief then put a call in for the stenographer. How much of a delay was there would you say? A. I would say close to an hour.

Q. Close to another hour? A. Yes.

Q. And when did you first learn that Rogers was going to give a full statement—about what time of the evening would you say? About what time would you say Chief Eagan got there? A. I think he got there about a little after eight, somewhere around there.

Q. And how much after that was it that the call was put in for the stenographer? A. A couple of hours later.

Q. So that it was about ten? A. I think I can say about ten.

Mr. ULLMAN. That's all.

Mr. ROBINSON. No further questions.

(Witness excused.)

JOHN A. HOLTZ, called as a witness on behalf of the Respondent being first duly sworn, testified as follows:

By the Clerk.

Q. Your name, please? A. John A. Holtz.

Q. Where are you from? A. West Haven, Connecticut.

Direct Examination by Mr. Ullman.

Q. You have been for many years County Detective attached to the State's Attorneys office in New Haven County; have you not? A. I have.

Q. On the morning of January 30th did you have in your

possession a gun which you had received from the police of New Haven in connection with a robbery of the Travelers Hotel some two or three weeeks previous? A. I did.

Q. And did you do something with that gun? Did you go somewhere with it? A. I did.

Q. Where did you ? A. I went to the Ballistics Department, State Police of Hartford.

Q. And were certain tests made? A. They were.

Q. And were the results of those tests told to you? A. They were.

Q. And on the basis of that information did you return to New Haven? A. I did.

Q. And then was Harold Rogers brought to the State's Attorneys office for questioning? A. He was.

Q. And did you still have the gun with you? A. I did.

Q. Now, were you present from that time on throughout the day and evening at the State's Attorneys office in and about the office? A. I was.

Q. Did you at any time hear Rogers ask for an attorney? A. At no time.

Q. Did you hear him talk about an attorney, make any reference to any attorney? A. No, sir.

Q. Did you hear any threat of force made to him? A. At no time.

Q. Any threat of any kind whatsoever made to him? A. At no time.

Q. Was there any such in your presence at any time that you heard? A. There was not.

Q. And were there breaks in the course of the questioning from time to time during that afternoon? A. Several breaks.

Q. In other words, was the questioning continuous? A. No, sir.

Q. Was the accused questioned so relentlessly as to put him under some sort of pressure? A. No.

Q. Did he appear to be to you relaxed in his answering of the questions? A. He was.

Q. Were you present at all times during the proceedings in the Superior Court of New Haven in this case? A. I was.

Q. And did you ever hear any claim made that there were threats addressed to Rogers that day? A. Never.

Q. Did you hear it today for the first time? A. I did.

Q. Did you hear counsel argue these points relative to the particular confession at times in the Superior Court in New Haven? A. I did.

Q. Did you ever hear him in the course of his argument make any claim of threats against his client?

Mr. ROBINSON. I object to that.

I don't recall having heard anything about it myself as a matter of fact.

The COURT. Overruled.

A. I did not.

Q. And did you hear him argue this point or these points at length in the Seupior Court? A. I did.

Q. Did you see Mrs. Rogers the wife of the accused at any time? A. I did.

Q. Will you tell us when? A. All during the course of the trial.

Q. Was it a protracted trial? A. It was.

Q. And did you see how she walked, get about? A. I did.

Q. Will you tell us anything about whether she required assistance? A. No.

Q. Or have any difficulty? A. Never required any assistance. She acted normal to me. I didn't know she was sick or never heard of that. She acted all right and acted the same when she got on the witness stand.

Q. Did she get into the witness box, take the stand without assistance? A. She did.

Mr. ULLMAN. That's all.

Cross-examination by Mr. Robinson.

Q. Mr. Holtz, do I understand you to say that you were present all during the trial? A. I was.

Q. You heard my argument and Mr. Ullman's argument? You remember them? A. I heard both.

Q. Do you remember any argument? A. Do I remember?

Q. Do you remember the argument that I made? A. I remember hearing the argument.

Q. All you remember is hearing them? A. Yes.

Q. Do you remember whether I claimed that these telephone calls by Chief Egan were threats? A. I heard you mention that fact.

Q. So you didn't mean that you didn't hear me make any claim of threats? A. When you are talking about threats, I am referring to the remark you made in regard to the Detective Ruggiero making threats.

Q. Did you hear Rogers testify this morning? A. I did.

Q. And didn't he say in effect this: "That Ruggiero said he would like to hit him in the mouth?" A. That's right.

Q. He said he never made any threat to hit him in the mouth. He simply said he would like to hit him in the mouth? A. That's right.

Q. Is that all he said? A. That is true.

Q. Now, you don't mean that that is a threat, you mean that that is something I didn't comment about in my argument? A. I didn't hear you mention anything as to Ruggiero making that remark, that he would like to hit him in the mouth.

Q. As the thing was set up there that day, if anybody really had liked to hit somebody in the mouth Ruggiero would like to hit Rogers. Rogers was shackled to a chair; wasn't he? A. Not what I would call shackled.

Q. Well, let's not handy words. He had a handcuff on?

Mr. ULLMAN. I object to that.

Mr. ROBINSON. Do you want to have him answer what he meant by shackled?

Mr. ULLMAN. I object to the comment of counsel about handying words.

Mr. ROBINSON. I will withdraw the question.

Q. He was handcuffed to the chair? A. He was handcuffed by one arm to the chair, an arm of the chair at the time, and at other times he was released with the handcuffs hanging on his arm.

Q. That is when he was eating? A. Eating; and on two occasions when he was taken to the men's room.

Q. Two occasions or once? A. On two occasions to my recollection.

Q. Did you hear these telephone calls by Chief Eagan? A. I did not.

Q. You weren't in there when they were made? A. Not in the room at the time.

Q. And you weren't in the room when he asked Eagan for a lawyer? You weren't in the room when that happened? A. I was not.

Q. Were you in the room all the time that Mulhern was there? A. Practically all the time.

Q. What do you mean by practically? A. There would be times that I would go to answer the telephone, walk back in, or I would go out to call someone to check something.

Q. You were going in and out all the time? A. I was in and out for short periods of time.

Q. And you weren't participating in any interrogation, or were you one of the ones that were? A. I did in the beginning.

Q. How long were you interrogating? A. I should say a half hour.

Q. And after that you just went in and out to telephone and things of that kind? A. And listened to some of the other interrogation.

Q. Would you say you left the interrogation room ten times in the course of that evening? A. During the afternoon I would say five to ten times, six, eight, ten times.

Q. Just to refresh my memory, haven't you been out of the office for some time during the last year with some sort of physical disability? A. A short time.

Q. When? A. Last September.

Q. You made no special observation of Mrs. Roger's condition except at the time of trial? A. At the time of trial is the first time I saw the lady.

Q. And that was a number of months between May and the time of interrogation? A. Yes.

Q. You never made any investigation of the number of times she has been to the New Haven Clinic or the condition of her left leg and knee; have you? A. I have not.

Q. Have you made any investigation as to whether she hasn't been known to fall down in the street? A. No, I haven't.

Q. But simply from observation, from observing her in the murder trial. You didn't look to see how she walked on the street? A. No.

Q. You saw her just in the courtroom, and this while her husband was being tried for his life and she appeared constantly; didn't she? A. She appeared every day.

Q. Appeared concerned about what was going on? A. Yes.

Q. And so far as you could tell from your observation of her fully clothed she looked like a normal rather well-dressed Negress; didn't she? A. She did.

Q. You never asked her how it was to sit through a day's trial with whatever condition she had? A. Never talked to the lady.

Q. Never made any investigation? A. I never talked to the lady.

Q. You didn't testify at the trial? A. I did not.

Q. No reason why you shouldn't?

Mr. ULLMAN. Object to that.

Q. You weren't in the hospital?

Mr. ULLMAN. How can this witness answer that.

Mr. ROBINSON. I will withdraw the question.

Q. You were not in the hospital?

Mr. ULLMAN. There are a lot of people who didn't testify in the trial.

Mr. ROBINSON. I understand that.

Mr. ULLMAN. The result was achieved that the State was after without him.

Mr. ROBINSON. The same result was achieved in the interrogation I claim.

Q. You were around there; weren't you? A. I was.

Q. And you heard the testimony concerning these incidents about requests for counsel? That was testified to by Rogers at the trial? A. He did make that claim in the trial, yes.

Q. And you didn't testify? A. I did not.

Q. Just to get this one point. You didn't know anything about those telephone calls—well, they are not either telephone calls

or—they were not telephone calls—but the pretended telephone calls of Chief Eagan? A. Only from what was testified at the trial, what was said in the trial.

Q. Let me ask you this, sir: Before any of those calls were made did you talk over the advisability of perpetrating such a ruse as that on Rogers? A. No.

Mr. ULLMAN. Object to that, if your Honor please. Object to "perpetrating a ruse." I say that it is perfectly legitimate and that proceeding has been endorsed by the Supreme Court of the United States as well as of other States. Object to that characterization.

Mr. ROBINSON. I don't mean to be offensive if I speak from my heart. I beg your pardon.

Q. You don't know anything about it? A. No, sir.

Q. Did Chief Smith announce to you that now he was ready to talk to you before the machinery was set up to take the statement? A. I don't know who you refer to as Chief Smith.

Q. Let me take that back. I mean Chief Eagan? Did he come out and say, say now that he was ready to talk, or something of that kind, and to get the stenographer? A. There was something said.

Q. By him? A. Yes.

Q. Didn't you ask him how he did it? A. No, sir.

Q. Did he tell you how he did it? A. No, sir.

Mr. ROBINSON. That's all.

Mr. ULLMAN. No further questions.

(Witness excused.)

Mr. ULLMAN. I might ask whether we could stipulate for the record that the accused did not take the stand in the course of the trial except on the preliminary inquiry on the confession. I might call Mr. Holtz back to ask him that.

Mr. ROBINSON. Well, there is no question about it. I certainly will agree.

Mr. ULLMAN. Then you have nothing further?

Mr. ROBINSON. May I ask your indulgence?

Mr. ULLMAN. You can always ask.

Mr. ROBINSON. Yes, and I am sure you will agree with me I want to put in before the Court, because of an omission in

drawing up one of these appendicies, that I wish to leave with the Court some testimony that was overlooked of Chief Eagan whom I suppose strictly should have appeared, and I am prepared to have him subpoenaed and brought here.

Mr. Ullman. I won't insist on the production of Chief Eagan. But I would like to know what it is you want to know.

Mr. Robinson. I want to have Chief Eagan's testimony added, page 493 and runs to the conclusion of the cross-examination on page 500, and any other portions of Chief Eagan's testimony.

Mr. Ullman. May I know what the purpose of the claim is, if your Honor please? I may be able to agree to it.

Mr. Robinson. Well, I assume that if Chief Eagan was here he would testify as he testified below. I shouldn't say "below," but he testified on trial that he made these telephone calls, pretended telephone calls, and the purpose of them was to extract a confession from Rogers; that he was called in at the last of the evening.

Mr. Ullman. I have no objection to that transcript going in.

The Court. Do you have it in shape to put it in now?

Mr. Robinson. Well, I can pull these pages out. I would like to get it in better shape and hand it to your Honor.

The Court. They may be marked Petitioner's Exhibit E. then.

Petitioner's Exhibit E; Transcript of Chief Eagan's testimony.

Mr. Ullman. These pages that are being offered relate only to the cross-examination of Chief Eagan and not to the direct examination. I want to call that to your Honor's attention.

Mr. Robinson. I think you will find the direct examination of Chief Eagan is in the certiorari.

Mr. Ullman. As long as that is pointed out I have no objection.

Mr. Robinson. Yes.

With that I think I have nothing further to offer in the line of evidence, may it please the Court.

The Court. Did you say that you wanted to put in the petition for certiorari?

Mr. Robinson. Oh, yes.

Mr. ULLMAN. That is your petition?

Mr. ROBINSON. Yes.

The COURT. Petitioner's Exhibit F.

Petitioner's Exhibit F: Petition for Certiorari

(Closing arguments.)

The COURT. Reserve decision on the Writ.

TRANSCRIPT OF TESTIMONY BEFORE THE DISTRICT COURT, SMITH, J.

October 29, 1956.

The COURT. Civil 6394 *United States ex rel Rogers* against *Cummings.*

I belive the present warden should be substituted as respondent.

Mr. ULLMAN. I didn't hear you.

The COURT. I suppose the present warden should be substituted as respondent?

Mr. ULLMAN. I believe that should be done.

The COURT. What is his full name?

Mr. ULLMAN. I don't have it right at hand. I will ascertain that during the course of the morning.

Mr. ROBINSON. And we will agree to it.

The COURT. He may be substituted.

Mr. ROBINSON. Before the arguments start, might I ask whether the Court might not be aided by our written position which we would be prepared at this time to file with the Court and with counsel.

The COURT. Yes, you may submit memoranda.

Mr. ULLMAN. I should like first to discuss my motion. I think it is the orderly thing to do.

The COURT. You may argue the motion orally and both submit memoranda if you desire to do so. Motion to amend and supplement finding and for rehearing.

I would like the arguments to be reported.

Mr. ULLMAN. If your Honor please, I should like first to address myself to the request for corrections in the findings as

made by the Court and in my discussion I will point out the paragraphs of my motion which I am discussing in each instance.

Mr. Ulman. First, we request that the Court amend its finding and I refer now to paragraph 5 of my motion, the finding that the interrogators were unable to obtain any admission before Captain Eagan. We ask that that be amended to read that Rogers, prior to his confession January 30, 1954, had admitted to the police that he had stolen the murder gun from his niece's home shortly before the Kennedy murder.

The evidence is undisputed and it is to be found in the transcript of the hearing before your Honor on pages 96 and 97 and the further admissions which are undisputed that he knew the decedent and the location of her store, which is to be found on transcript page 93. But as to the first phase of that request there never has been any dispute that this gun had been stolen by Rogers on the day of the Kennedy murder.

We next request correction of the finding that refers to eight hours of questioning before Captain Eagan, and I am referring to paragraph 6 of my motion. We ask that that be changed to read six hours because the facts are undisputed that Rogers arrived at the State's Attorney's office at one o'clock and he was not questioned, according to his own testimony, he was not questioned during the first hour so that the questioning before Captain Eagan's arrival at the most would amount to six hours of elapsed time and I refer, your Honor, in that connection to the transcript, page 40 and 41, as well as Exhibit F, page 80.

Now as to paragraph 7, we requested that the Court amend its finding characterizing the questioning as prolonged, since the undisputed evidence proves that there were frequent interruptions for the purpose of both coffee breaks, smoking, going to the men's room, telephone calls and checking by police officers. There was also an interruption when Rogers took a full hour to consider whether to confess and there was a further period of waiting the arrival of the court reporter.

That evidence is to be found on page 78, page 103, page 114 of the transcript. And Rogers actually seemed to acknowledge that there were all of these pauses because he said that those pauses, he tried to make the claim that those pauses were objectionable, recesses were objectionable.

And paragraph 9, we ask that the Court correct its finding with respect to the statement Rogers made a confession, completed it thirteen hours after the beginning of the questioning on the ground that the evidence is clear that the questioning began at 2:00 o'clock and that the session was ended at 12:30 so that that would make 10½ hours rather than 13. But the significant fact we submit, if your Honor please, is not when the session concluded, but when he confessed and the evidence is on that undisputed that he confessed shortly after 10:00 o'clock so that it is 8 hours after the start of the questioning that he actually made his confession because the time after that was consumed first in waiting for the court reporter and secondly in putting it down in the 30 pages of transcript that we have referred to at the hearing.

So that at the most; the confession came between 8 and 8½ hours after the start of the questioning.

We ask that the Court amend its finding that Rogers was interrogated in relays by the police because that phrase carries with it the implication that the interrogators of a certain party became exhausted from the strenuous type of questioning and had to be relieved, which fact and inference are actually without support in the evidence.

And this Court recognized that there were interruptions when this Court says there were intermissions, the questioning was intermittent; I think your Honor has said that in three points during the course of the decision.

We ask that the Court strike its finding that until Rogers confessed he was kept unavailable to counsel on the ground that no counsel was admitted to see him on the day of his confession to the police this fact that he claimed counsel, as found by the Court,

not to be true. The trial court found no request was made by Rogers for counsel.

Paragraph 12, we request that the Court amend its finding that at the end of that time he took the 'phone to pretend to order Mrs. Rogers and the children brought in on the ground there is no evidence that Captain Eagan stated Mrs. Rogers' foster children were to be brought in but rather the evidence is clear they were to be cared for by proper persons while Mrs. Rogers was to be questioned by the police as to her knowledge of the subject matter.

May I refer your Honor in that connection to Exhibit F on page 34. The questioning there, the third question from the top, "Did you make a telephone call in Rogers' presence with regard to having his children or the children that were living with him and Mrs. Rogers taken care of when she was brought down?" Answer, "I made a call. I talked to no one." "It was intended to give him the idea," skipping a couple of questions, "that if he did not give a statement his wife would be brought down for questioning?" Answer, "I had talked to Rogers and when he asked me why I wanted to bring his wife down here I said I had to bring her down because he was arrested for some crime and it was possible in his excitement knowing that was the question I had talked to him about may have told his wife some things and that's when I made the call."

And in that connection look at Rogers' testimony on page 42 of that same exhibit, at the bottom of the page showing that the children were to be cared for. "He said he was going to check my wife up and have her come down and have the two children and he picked up the telephone. I thought he was telephoning. He was talking to Headquarters. Said "Get a squad car ready to pick up Mrs. Rogers and have the matron pick up the two children and take them some place and keep them overnight." That illustrates the children were not to be brought in, but they were to be properly cared for during this questioning of Mrs. Rogers.

In paragraph 13 we ask that the Court amend its finding that Rogers feared his wife and children were to be taken into cus-

tody which appears on page 3 of your Honor's decision because there is no evidence, nor does the defense claim Rogers' wife and her wards were to be taken into custody by police. Questioning appears in Rogers' testimony at the trial that she was to be brought down for questioning and the children merely were to be taken care of as an added convenience to Mrs. Rogers, as well as, incidentally to Rogers himself, and of course I might say parenthetically that these weren't his children so that it isn't altogether correct to cite in the finding Rogers feared his wife and children were to be taken into custody. And in that connection, in connection with this whole paragraph 3, I refer your Honor not only to page 34 of the record, but pages 42, 43 and 46. And also I would refer to page 494 of Exhibit E which is the transcript of Captain Eagan's testimony at the trial, at least partial transcript.

Going now, if your Honor please, to paragraph 18 we respectfully ask that the Court amend its finding that Mrs. Rogers suffered from arthritis but was able to attend the trial on the ground this finding implies on the day of the confession Mrs. Rogers was unable to move about but at the time of the trial she surmounted all of her difficulties and her suffering and appeared there as a witness, which statement has no basis in fact. There is no such evidence as to her being unable to move about on the day of the confession.

In paragraph 27 we ask that the Court amend its finding that Rogers was advised "pro forma" of his rights and that the coroner expressed willingness that Rogers see Counsel on the gound that the coroner carefully advised Rogers at length of his rights and used such terms, as your Honor will observe from the evidence, as "wish" "choose" and "entitled" to and so forth and that at the conclusion of the warning the accused responded "I understand."

Furthermore, Rogers was aware of his rights as it more fully set forth in the following paragraph, but in this connection I would ask that your Honor refer to the transcript on page 68 on the subject of whether Rogers knew and was aware of his rights as a result of what the coroner told him. On page 68: "Q. Do

you remember what the coroner said here about your right to a lawyer?" A. He said I didn't have to say anything unless I wanted to." Page 68. "And do you remember what he said about a lawyer?" "A. I don't know exactly what he said." And "He said I was entitled to one if I wanted one." "Q. You could have one if you wanted one?" "A. Yes." "Q. So that you remember the coroner said to you that you don't have to testify unless you want to and that you could have a lawyer if you wanted one?" "A. That's right."

So that, if your Honor please, illustrates that this was not merely a pro forma statement by the coroner, but one which the accused was able to understand and be altogether aware of his rights not to talk and his right to have counsel.

In Paragraph 28 we ask that the Court amend its finding that at the coroner's office Rogers was, for the first time, warned of his rights which finding is without evidence. Your Honor will recall that Rogers was a brother of a police officer and it is undisputed that Rogers had been arrested four times before January 30, the date of this questioning and there is nothing to indicate that he had not been previously advised of his rights in this respect so that the coroner's statement "I think you are acquainted with the law in a general way" was well-founded in fact and to that statement Rogers made the affirmative response, "I understand." And he reinforces it with his testimony on page 68 which I have just read. Also it is in evidence on page 497 of Exhibit E. It was put into evidence by Rogers at the last hearing, the bottom of that page. Captain Eagan, a witness, says: "I told Rogers in talking to him about this case, about the gun being in his possession and about being used in a crime in another matter" continue to page 498 "what he told me would not be any benefit to me, so far as I am concerned, because I had no power to draft any charge, whatever he did one way or the other he had to stand before a jury or before a court of judges."

So that aside from the fact of his four prior arrests and his brother being a police officer and also that statement, there is that statement of Captain Eagan's which indicates he had some

sort of warning before he appeared before the coroner on the 31st of January.

Now we ask also, if your Honor please, that there be certain additions to the finding, on the basis of the evidence before your Honor.

In paragraph 4 on page 3 of my motion, if your Honor please, we ask that the Court amend its findings that the gun had been stolen from his niece's house prior to the finding of November 21, 1953 to read that the gun had been stolen by Rogers from his niece's home on the very day of the murder which fact is undisputed and I refer your Honor among other things to the transcript, pages 96 and 97.

We ask in paragraph 8 that the Court add to the finding that there were two full hours on the 30th of January during which Rogers was not questioned at all. One was directly after his arrival at the State's Attorney's office and another hour directly preceding his confession which fact is undisputed and I refer your Honor to Rogers' own testimony in the transcript on page 64.

Paragraph 14. We ask that the Court add a finding that prior to January 30 Mrs. Rogers had been interrogated by the police which fact is undisputed. The transcript of that, page 76 and page 89. That of course is a questioning in connection with other matters, other crimes.

We ask in paragraph 15 (b) that the Court add a finding that during the questioning on January 30 Rogers sat in a comfortable arm chair which I refer your Honor to the transcript page 73, throughout the interrogation; that he was permitted to smoke and I refer your Honor to Exhibit F, page 67 and that exhibit, if your Honor please, shows that he smoked not only his own cigarettes but Captain Eagan's cigarettes and others that were brought in to him. That is a matter of evidence, Exhibit F page 67.

He was allowed to go to the men's room at his request and he appeared to be relaxed. Transcript page 92 and also 117. And also the fact, if your Honor please, he had one arm free

for the greater part of that session. His own testimony on page 46 of the transcript shows that from the time that he was allowed to smoke it was in the afternoon and all throughout the evening when Captain Eagan was present until he was ready to go home. Rogers himself said he had one hand, one arm, altogether free. That is on page 46 and also on page 74.

We ask also the Court add a finding that Rogers responded to questions unhurriedly, deliberately and comfortably which is undisputed and appears in the transcript on page 93. And also as is asked in paragraph (e) of this same paragraph, sub-paragraph (e) top of page 6, Rogers acknowledges in his own testimony before your Honor that the questioning did not in any way confuse him. That is in the transcript on page 58 of Rogers' testimony. And so we ask that that be included in the finding.

We ask too, in paragraph G that at no time did the prisoner request more food, that that be added to the finding made by this Court.

Paragraph I, we ask the Court to add a finding that at no time did Rogers request to see Mr. Robinson nor Mr. Corse nor did Mr. Robinson nor Mr. Corse attempt to see him during the day of the questioning by the police.

Paragraph J, we ask that the Court add a finding that Captain Eagan told Rogers that he was going to bring Mrs. Rogers down for questioning since she might have some knowledge concerning the subject matter and that Mr. Rogers' foster children would in the meantime be taken care of at the Children's Village that the stated purpose of Captain Eagan to Rogers in saying he was going to bring Mrs. Rogers down was because she might have some knowledge concerning the subject matter. And for that we have Rogers' own testimony on page 43 of Exhibit F as well as Captain Eagan's testimony on page 34 of that same exhibit.

We ask that a finding be added to the effect Captain Eagan never promised Rogers that if he confessed his wife would not be questioned. Exhibit F, page 33. An undisputed fact.

We ask that there be added also a finding that the taking of the confession itself was recessed when a police officer brought in coffee to all those present, including Rogers, right at the start of the confession, that is in addition to the food and coffee that was brought in earlier during the attempt.

We ask that the Court add a finding to the effect that none of the interrogators had any knowledge that Mrs. Rogers had an arthritic condition and I refer your Honor to Exhibit E page 494 and page 495, the exhibit offered by Rogers at the hearing before your Honor as well as to the testimony of Sergeant Mulhern before your Honor on pages 75, 76 and 91.

I call to your Honor's attention that it was Captain Eagan alone who was with Rogers at the time that he confessed and when his talk was had concerning bringing her down and that he knew nothing at all not only about any arthritic condition but about any claim of sickness.

We ask that the Court add a finding that, aside from Rogers' present claim there is no proof that Mrs. Rogers had an arthritic condition nor is there any evidence of the seriousness nor extent of such an alleged condition.

A further addition that we seek is that after Captain Eagan stated his intention to question Mrs. Rogers, Rogers then devoted a full hour to considering (1) whether he should confess and that is maintained in Rogers' own testimony, Exhibit E, page 43, and (2) to the excuse or explanation to Eagan in attempted mitigation of his crime. And I refer your Honor there to Exhibit E page 495 where it is stated that Rogers' prefaced his confession by saying "I was drinking that time" and I refer your Honor also to these claims in mitigation about which I will refer later, exhibit F page 20.

We ask that there be a finding to the effect that Rogers confessed early at approximately 10:20 P. M. because we feel that that is the crucial time to be fixed rather than sometime somewhat later and in that connection we refer your Honor to the

transcript page 114 which says "at about 10:00 o'clock" and to Exhibit F page 3 which fixes the time at about 10:20.

We ask further an amendment to the finding to the effect that an official court stenographer came in at approximately 10:00 P. M. to take a transcript of the confession that appears in the transcript before your Honor on page 74.

We ask that the Court state in its finding that the confession itself was a 30 page statement at the conclusion of which Rogers made oath to the truth before a notary public. That is to be found on page 113 of the transcript.

We feel also that it is essential that the Court add a finding to the effect that in the interrogation of Rogers there was no deprivation of food, rest or relief, which facts are undisputed. We seek that in paragraph 16 of our motion.

In paragraph 17 we ask that the Court insert a finding that the police did not resort to persistent, relentless or continuous questioning because we feel that that is one of the criteria to which the courts look in determining the voluntariness of a confession.

Continuing to paragraph 20. We ask that the Court amend its finding by adding a finding that Mrs. Rogers attended every session of the purported murder trial without assistance and without apparent difficulty and also entered the witness box without assistance which facts are undisputed. The evidence thereon is to be found among other places in the transcript before your Honor on page 118.

We ask in paragraph 22 of our motion that there be added a finding that Rogers was altogether unaware of the fact that he had been brought to the State's Attorney's office without a court order which is undisputed fact, which we feel should be a part of this Court's finding.

We ask that there be added also a finding that following the conclusion of Rogers' confession to the police on January 30, he was not again questioned until he was presented before the coroner some 17 hours later which fact is undisputed and I refer

your Honor to the transcript on page 27. Five o'clock the following afternoon it was when Rogers was presented before the coroner.

Paragraph 25 we ask that the Court make a specific finding that Rogers was presented before the coroner at 5:00 o'clock that following afternoon at which time his entire confession was given under oath within a period of one and a half hours. Again we refer your Honor to the transcript, page 27.

In paragraph 29 of our motion we ask that there be added a finding that prior to the questioning on January 30 Rogers had been placed under arrest on at least—although my motion says three I would ask four other occasions prior to January 30, if your Honor please in Connecticut and in New York which fact is undisputed. Your Honor will recall the reference to his arrest in Elmira, New York, his subsequent arrest in New Haven on parole violation; his arrest for violation of the liquor law and his arrest on January 9 on the crimes at the Travelers Hotel. I refer your Honor in that connection to the transcript page 48, page 51 and page 52.

We ask that there be an addition to the finding to the effect that Rogers had been subjected to questioning by the police on the day following the murder when he reported that his nephew's gun had been stolen by persons unknown. That is Rogers' own testimony, if your Honor please, transcript page 56. He was questioned on the day following the murder when he reported that his nephew's gun had been stolen by persons unknown and that he was questioned by the police on January 9 and January 10 following his arrest for robbery and theft at the Travelers Hotel as well as on the occasions of his prior arrests by New York and Connecticut police which facts are undisputed and I refer your Honor to the following pages of the transcript, 55, 56, 57, 96, 98 and 99.

In paragraph 31 of our motion we ask that the Court insert into the finding the compelte text of the coroner's preliminary statement together with Rogers' response. We feel it is of the

utmost importance. We refer your Honor there to transcript page 69.

We ask that there be added to the finding that Rogers fully comprehended the statements of the coroner that he did not have to say anything unless he wanted to and that he was entitled to a lawyer if he wanted one, which facts are undisputed and which came from Rogers' own testimony as we have already said, on page 68 of the transcript.

We ask that there be added also a finding that Rogers fully understood his rights, made no request for a lawyer at the outset of the coroner's hearing, which fact is undisputed. Again this is to be found in the transcript on page 68.

We ask that the Court supplement its finding by adding a finding on the question that the questioning of Rogers by the coroner did not adversely affect him. That fact is undisputed.

Paragraph 37 of our motion we ask that the Court add a finding that aside from the confession of Rogers, there was considerable other evidence of Rogers' guilt of this crime. There is the evidence, I might state if your Honor please, of the gun being in his hands on the day of the murder; there is the evidence that on the following day he made a false report to the police, that is, that the gun had been stolen by persons unknown, rather than by himself. There is the further fact which he could not escape that the gun was in Rogers' possession on January 9 when he was arrested for the Travelers Hotel crimes.

There is the further fact that he first claimed that the gun was won in a crap game by him and then on the following day he admits that he himself, in a statement to the police, that he himself had stolen it from his nephew sometime I believe he said in November. Those facts are undisputed and there is also that admission that he had made before the confession that he knew where the Kennedy store was and he knew Mrs. Kennedy, the victim of this murder. So we ask, therefore, that those facts be added to the finding.

We ask also in paragraph 38 that there be a finding that Rogers did not take the stand as a witness during his trial, except as a witness on the preliminary inquiry as to the voluntariness of the first confession. He did not appear even on the hearing of the second confession as a witness, which facts are undisputed. We refer your Honor to page 125 of the trapscript.

In paragraph 39 we ask that the Court amend its finding by adding a finding that Rogers was represented by counsel on the day of the Grand Jury indictment and at all times since which fact is undisputed.

In paragraph 49 we ask that the Court strike its finding that Rogers gave in to a threat because Rogers expressly acknowledged on page 66 of the transcript that despite the threat he would not have made the statement had he known that his wife could not be used as a witness against him, despite that threat he would not have made his confession. Would that indicate to your Honor, if your Honor please, that it wasn't the threat to which he gave in but there were other considerations that motivated the confession? Page 66 "If you had been advised by counsel that your wife could not be used as a witness against you" and the answer "I would have made no statement." We ask that that finding be stricken because of Rogers' acknowledgment that despite the threat he would have made no statement had he known that his wife could not be used as a witness against him, or in the alternative, we ask the Court supplement its finding by adding a finding Rogers gave in to the threat because he feared his wife could be used as a witness against him.

Similiarly in paragraph 46 we ask that the Court add a finding that Rogers was motivated in making a statement because of his belief his wife could be used as a witness against him. We say that is reported in the testimony, page 66.

We ask further the addition of a finding that Rogers was motivated into making his confession because of the fact he feared his wife as a witness against him, could give incriminating information to the police.

We ask too that the Court amend its finding by adding the finding to the effect that the "due process" questions raised in this proceeding have been previously presented by the relator in three successive stages of the proceedings and determined adversely to him, and were also presented on petition of certiorari to the Supreme Court of the United States which denied certiorari.

Now if your Honor please, at this point I would like to state that we feel that such changes of finding are warranted, beside other considerations, for the reason that this Court has predicated its decision on the following considerations:

(A) Removal of Rogers from the jail to the State's Attorney's office without court order of which lack Rogers was altogether unaware and which accordingly had no causal relation to the confession and which, in any event, this Court recognizes is not sufficient in itself to invalidate his later confession and does not, in itself, constitute denial of due process.

(B) The second ground on which this decision seems to rest is the denial of counsel during the police interrogation which is a disputed fact, of course, and found by the Connecticut trial court to be without basis and which, in any event, this Court recognizes does not in itself constitute a denial of due process.

(C) And the third ground of the decision, prolonged questioning by the police which is a disputed fact also found by the Connecticut trial court to be without basis and in any event this Court recognizes that although the elapsed time may have been 8 to 8½ hours before the confession, that the questioning was not unremitting and, in any event, the period of questioning falls far short of limits thought to be fair, and found unobjectionable by the Supreme Court of the United States.

And the 4th ground, the remark of Captain Eagan with respect, with reference to sending for Rogers' wife for questioning which is not inherently a threat and which this Court has recognized might, in its decision, might not be likely to cause a confession to a capital crime.

And so we ask, too, that the Court strike its finding that part of its finding that terms the remark of Captain Eagan a threat and in this connection I'd like, if your Honor please, to submit the brief which refers to some of these other matters.

On the question of the appropriateness, discussing this remark of Captain Eagan's as a threat, our motion to strike that finding, I would state, as your Honor knows, the police here were engaged in a murder investigation. Rogers, by reason of his possession of the murder weapon and a few other considerations was a reasonably natural suspect. That being so, no investigation worthy of the name would fail to give high priority to the questioning of Mrs. Rogers, wife of this suspect. Rogers concedes that Captain Eagan inquired whether he had any conversations with his wife regarding this crime. This is on Exhibit F page 43, which is noted in the brief. I think your Honor does not need to make a note on it as I have it in the brief. "He asked me did you have any conversations with your wife regarding this crime?" It certainly would be appropriate for Captain Eagan to put a similar question to Mrs. Rogers. It was not only the right but the duty of the investigating officers to seek information from her. Since the act of questioning her would not have been illegal, a mere statement of an intention to do so should not be considered illegal. And most certainly it should not be classified as a threat that would vitiate a confession.

We have citations for the statement that a remark to do something that an officer has a right to do is not a threat in the legal sense. This appears on the first page of our brief. And I state to your Honor that federal and state courts have expressly upheld statements almost identical to those used by Captain Eagan in the interrogation of the suspect prior to his confession. We state that they have not only expressly upheld it but almost invariably have upheld such a remark and have not designated it as a threat which would vitiate a confession and I think it is important to observe some of the cases I cite in my brief.

First, in *Vogt vs. U. S.*, there the defendant claimed error in admitting in evidence his confession obtained after police officers

threatened: "We are going to pick up your wife and bring her down to jail and question her, too." The admissibility of the confession was sustained and the Court held at page 312: "Such a remark by the investigating officers cannot be classified as such a threat as would destroy the voluntariness of the Defendant's confession. Even if one of the Defendants made the confession in order to prevent his wife from being investigated, it was, nevertheless, his voluntary statement."

In *Henson* vs. *State* the defendant confessed to a crime, resulting in his conviction and sentence of ninety-nine years, because of his claimed fear that the police officers would carry out their threats to physically injure his wife. The officer stated "When I get back to Henderson I am going to get that lying wife of yours and she is going to get just what you done got. We are going right back and get her." Thereafter, his wife was arrested and taken into custody, whereupon the defendant confessed to the crime. The Court held that the officers' statement did not render the confession involuntarily, because "no statutory, or state, or federal constitutional right of the appellant" was violated.

In *State* vs. *Grijego*, the defendant claimed that "the discomfort of his wife while she was in custody induced his confession." The defendant's wife was taken into custody about 5 P. M. for questioning and "repeatedly questioned during the night," and "complained of being hungry and cold on several occasions." The Court held that these acts did not constitute coercion or duress on the part of the police.

In *Hawkins* vs. *U. S.* federal case (1946) the defendants confessed after being told by the police officers that "Well, we got your people, you better tell us something or else they will be questioned just like you have been," and that if they didn't sign a confession, the police were going to lock his family up." The Court stated that even if such threats were made, the confession would not be rendered involuntarily because "it is not obviously probable that a man who confesses a capital crime does so in order to expedite release of relatives who are not implicated or accused, even if he has been told that this result will follow."

In *People* vs. *Hubbell*, the Court held that the defendant's motive to prevent children from being brought into court did not render the confession involuntary, stating at page 504 that: "It must be apparent that a confession dictated by the hopes and motives of the accused and inspired solely by his own mental processes and emotions is voluntary in the legal sense."

In *State* vs. *Beard* the defendant confessed because of apprehension and concern about his fiancee plus the promise made by the police officer "to turn her loose." The police officer testified that he told the defendant that if the defendant's fiancee did not have anything to do with the crime he would let her out. The court stated: "This cannot be construed as an inducement or promise but is rather the statement of customary police procedure in a criminal prosecution; the truth and propriety of which are well established and can hardly be controverted."

Again in *State* vs. *Pierce* a threat to bring the mother of the accused to the police station and interrogate her was held not to vitiate the confession and that Court made a detailed survey of federal and state law on the subject as authority, sustained the admissibility of the confession.

Similarly, in *People* vs. *Candiotto*, a confession given to save girl friend's implication in the crime and in *People* vs. *Sabellino*, a confession given to obtain release of sister.

But even assuming, if your Honor please, for the sake of argument, that Captain Eagan's statement constituted a legal threat, Rogers' confession was not involuntary because of the lack of causal connection. His own testimony, as I have stated, is he would not have confessed had he known his wife would not be used as a witness against him, so that this completely refutes his claim that he confessed to save his allegedly sick wife from police interrogation. This constitutes further proof that his resistance was not overcome since, notwithstanding the threat, he says that he would still not confess if he had known that his wife might choose not to testify against him.

The lack of causal connection between this remark of Captain Hagan's and the threat may perhaps more readily be seen, if your Honor please, if the remarks are translated from a threat to bring Mrs. Rogers down for questioning if Rogers did not confess into a promise not to bring her down for questioning if he did confess. The remark "to bring her down" if he did not, is actually tantamount not to bring her down if he did. Such a promise is universally held not to constitute such a benefit as would vitiate a confession. To make a confession involuntary, the benefit which influences it must have reference to the confessor's escape or partial escape from punishment for the crime with which he is charged.

A confession induced by a promise is not rendered inadmissible unless the promise or hope excited relates to some benefit to be derived by the criminal in a criminal prosecution. (Citing in my brief in *State* vs. *Beard* and *State* vs. *Willis*.)

Just as the hope of benefit influencing a confession so as to render it involuntary must relate to the particular crime confessed or to its punishment, so also a threat must have an immediate and direct relation to the confessor in order to invalidate an ensuing confession. The promise of a collateral benefit does not render a resulting confession inadmissible. I believe that that law is almost universal.

So if your Honor please, I can't refrain from pointing out that it is most significant to know at the outset of this matter even the defense did not consider the remark of Captain Hagan as a coercive threat or of such significance as would effect the admissibility of a confession. In making their argument against admissibility, they base it on two, solely on two grounds, (1) prolonged questioning, and (2) lack of counsel. I would like to point that out specifically if I may, to your Honor. Does your Honor have there the record, State record? At page 27, your Honor will observe we have concluded the evidence relating to the admissibility of the first confession.

This was the preliminary hearing in the absence of a jury wherein the Court ultimately found that the confession was

voluntary and so at the top of page 27, there is the statement that there is nothing further for the State and Mr. Corse asked "Will your Honor hear me briefly on it?" And Mr. Corse says I had no further evidence; I had specified that—"Your Honor, I claim this statement is inadmissible as a confession and essentially on two grounds, the first being the long duration of the questioning period during which time he was, the evidence shows, kept handcuffed." There is no claim, of course, of any actual violence toward him but he was kept handcuffed and was relentlessly questioned during all that period.

Your Honor has found he was not relentlessly questioned; it was intermittent. I cite to your Honor the case of *Turner* against *Pennsylvania*, United States Report at page 62. It's a 1949 case in which there was questioning over a period of some days in that case during which the accused was not allowed to see friends or relations nor was he informed of his right to remain silent until after he began to dictate his confession. In this case, so far as the evidence shows, he was never informed of that right.

"A further ground," says Mr. Corse, continuing, "is the denial of the access to counsel."

In connection with that I would cite to your Honor the case of *People* vs.—(pause) *The State of California Supreme Court*. I don't have the information. The citation, specific citation is 226 Pacific at 330. It was in 1951, and I call your Honor's attention to this passage appearing at 226 Pacific 2nd. This your Honor will perhaps realize is a version of the same case I stated to your Honor earlier. The issue being discussed by the Court here is the fact an attorney during the time the confession was obtained, from the accused, attempted to see the accused and was denied access to the accused. There was no evidence to show the accused, in this particular case, had even asked for an attorney but the attorney had represented him and attempted to see him.

The Court says in this case, if the Court please, continuing, that there's no denial confession in existence, at least none has been shown to be in existence, that is not tainted by this same defect, the denial of access to counsel in spite of a request.

So that you have there the two grounds on which counsel, after three months of preparation for trial, the two grounds on which he bases his claim.

But I would like to continue just one paragraph further, if your Honor please, later on in page 28, Mr. Corse concludes: "I therefore object to the admission of the confession." Mr. Robinson: "Will your Honor pardon us a second?" And then there was a conversation between Mr. Robinson and Mr. Corse and the conclusion of which Mr. Corse says: "Mr. Robinson suggests for the record, and I concur in his suggestion, that this claim is made under the 14th amendment to the United States constitution and under the provisions of our State constitution which prevents an accused being forced to testify against himself."

Not a single reference was ever made to the conclusion of their opening arguments, against the admission of this confession and thereafter they mention only two points.

Now thus one now appears to have become decisive to this issue, was not then deemed even worthy of mention.

Now of course to be fully candid with your Honor, after my argument and after further argument by Mr. Corse, in the very last line of his argument on the point, the very last line, he refers to my statement that there were no threats or promises and then for the first time reference is made to Chief Eagan's threat to bring Mrs. Rogers in who the accused testifies was ill. That is the only reference to it and, as a matter of fact, if Your Honor reads the examination by Mr. Corse of Captain Eagan nowhere is there reference to this as a "threat"; he calls it a suggestion on page 34 on the question of time. "Is that the hour you told me a moment ago elapsed from Chief Eagan's suggestion to bring Mrs. Rogers down to the time he made that statement?" And always Mr. Corse says "bring her down for questioning." Never does he say in this hearing, as your Honor says in the finding here that she was to be taken into custody. The claim of taking her into custody didn't arise until long after this case was concluded.

And so we ask the Court to amend its finding and conclusion that Captain Eagan's statement constitutes a threat and we ask the Court too, to add a finding that the police were justified in stating that they intended to question Mrs. Rogers.

We next ask, if your Honor please, that the Court strike its finding to the effect that the trial court refused a requested instruction that the jury might disregard the confession if it found them involuntary. In that connection I would like to point out if I may that there are two recognized constitutional methods of handling confessions at a trial. One is designated the orthodox rule and the second the New York rule. Under the orthodox rule, the voluntariness of the confession is a question exclusively for the trial court as a matter of competency of evidence, and the jury determines the weight or credibility of the confession by considering all of the circumstances attending the giving of the confession. That is the orthodox rule.

Under the New York rule, the trial court must submit to the jury the issue of voluntariness. Now of course each State may determine the rule it wishes to follow and both methods are deemed constitutional. I refer your Honor in my brief to *Stein* vs. *New York* and *Lyons* vs. *Oklahoma*.

Now the Connecticut Trial Court properly applied the orthodox method. The record will show that the Court first finding that Rogers' confession was so far voluntary as to be competent for jury consideration and the jury thereupon considered all of the circumstances attending the confession in its effort to determine what weight to give them. Under this method the issue of voluntariness is not for the jury and accordingly this issue, this instruction, was properly not included in the charge. With voluntariness decided by the judge, the charge to the jury cannot become a federal issue. And I refer your Honor to an article, recent article in 30 *Conn. Bar Journal* at page 229.

Now the test of admissibility actually applied by the Trial Court was the voluntariness of the confession and not its truthfulness, so amply apparent first from the verbatim finding of the Court in ruling the confessions admissible after a preliminary hearing

in the absence of the jury, and I refer your Honor to the Record on page 38 through 42. A detailed finding, if your Honor please, that these confessions were voluntary. That was the issue that was before the Trial Court on the preliminary hearing.

I refer your Honor also to the Court's charge wherein it is amply clear that the voluntariness was decided by the Court and the truthfulness, the weight and the credibility, was left completely to the jury and that that was the basis on which the case was tried.

I refer your Honor also to the State's brief to the Supreme Court of Errors on page 10. Moreover I might say that when the State attempted to ask Rogers during the preliminary hearing whether he told the truth in his confession, that question was excluded by the Court because the only issue at that point was the voluntariness of the confession and, at the conclusion of the evidence, the Trial Judge in accordance with the orthodox method, carefully charged the jury at length with respect to these confessions, telling them repeatedly and fully that the weight was to be considered by them and that they were to take into account all of the circumstances attending the confessions of which the defendant was complaining at the time of the trial. What was said to him, how he was brought to the State's Attorney's office, denial of counsel, request for counsel and all of those things were to be taken into account by the jury in determining the weight to be given those confessions and the circumstances were laid before the jury in that manner and that was all in accordance with the orthodox method.

Now the practice, procedure and scope of instructions to juries are for the courts of the state and if the legal requirements of the State of Connecticut concerning such instructions are satisfied, there can be no claim of violation of the Fourteenth Amendment. And I cite *Lyons* vs. *Oklahoma*.

In following the orthodox method in this case, the Trial Court was thereby adhering to the long-established law and practice of the State of Connecticut. I refer your Honor to *State* vs. *Palko* wherein it is held clearly the test of admissibility of confession in this State is whether the confession was voluntary.

Whether a statement is freely given and fairly obtained is a question of fact to be decided by the Trial Court in the exercise of its legal discretion. And I cite Connecticut cases, *Connecticut* against *DiBattista, Wakefield, Cross and Constantakis*. And it was decided in these cases as well as cases very recently decided the decision as to whether a confession is so far voluntary as to make it admissible in evidence is to be made by the Court in the absence of the jury. *State* vs. *McCarthy*, cited

The trial Court after preliminary hearing, must determine whether the confessions were the result of illegal detention or of coercion, physical or psychological. That must be done by the Court in preliminary hearing. And I cite *State* vs. *Lucas*.

Once the Court has determined the competency of the evidence the truth of the matters contained in the confession becomes a question for the jury and the description of the circumstances under which the confession was made may assist them in determining that question. *State* vs. *McCarthy*.

The circumstances surrounding the confession are submitted to the jury, not for the purpose of determining its voluntariness and therefore its competency, but so that the jury may determine therefrom the weight or credibility of the confession. And so I say it was altogether proper for the Court to refuse the requested instruction on voluntariness. Such an instruction would not have been appropriate in a jurisdiction such as Connecticut where it is the exclusive function of the court to determine the voluntariness of the confession. In such a case the jury is not to be instructed to disregard it if they find it involuntary because that would usurp the court's function to determine the competency of the evidence. The jury is to be instructed merely to consider the circumstances attendant upon the confession in determining its weight and credibility. And I cite a number of cases on page 8 and at the top of page 9 of my brief in that connection.

The states are free to allocate these functions as between judge and jury as they see fit, as is held in *Stein* vs. *New York*.

Since the Trial Court was following the orthodox rule, the sufficiency of the charge loses its relevance and I cite 30 *Connecticut Bar Journal* 221, 229.

Now the Trial Court, if your Honor please, having applied the proper rule as to admissibility and it being the crucial and primary one, any misstatement of the test by the Supreme Court of Errors in sustaining the Trial Court, should be disregarded and I cite in that connection *Stroble* vs. *California* and also ask your Honor to refer to *Connecticut Bar Journal*, volume 30. If there was a misstatement in certain parts of the decision by the Supreme Court of Errors I say that that misstatement must be disregarded so long as the Trial Court applied the proper test.

And so we ask the Court to strike that part of the decision which refers to the refusal of the requested instruction on the ground such an instruction would not have been proper.

Now we ask these changes in the finding because we respectfully submit that Rogers did not sustain his burden of proof nor did he introduce clear and convincing evidence sufficient to warrant this Court in either overriding the Connecticut Court's ultimate conclusion of fact concerning these confessions or in finding basic and underlying facts diametrically contrary to those found by the Connecticut Triers.

A federal court may override a state court's adjudication on the ultimate conclusion of facts as to the voluntariness of a confession only in extraordinary circumstances when the evidence is so clear and convincing as to leave no reasonable doubt in the mind of the court that the petitioner was convicted in denial of his constitutional rights. And I refer your Honor to *Brown* vs. *Allen* as well as *Sharpe* vs. *Kentucky* and *State* vs. *Sullivan*.

Now in your Honor's decision reference was made to the case of *Cranor* vs. *Gonzales* and we submit it is clearly distinguishable because your Honor will recall in *Brown* vs. *Allen* Justice Frankfurter had stated "unless a vital flaw be found in the process of ascertaining such facts in the state court, the district judge may accept their determination." Unless a vital flaw be found in the process of ascertaining such facts.

Now in the *Gonzales* case there was such a "vital flaw," in that the District Court had no way of ascertaining how the controverted underlying facts were involved. This difficulty arose from the fact that the trial court followed the New York method of trying the coercion issue to the jury. Not the orthodox method, but the New York method, which is the practice in that State. This method, as was pointed out in *Stein* vs. *New York* at page 177, is not informative as to its disposition since we cannot learn whether the final result was to receive or to reject the confessions as evidence of guilt.

The Court in the *Gonzales* case at page 90 held that when it appears that a confession was in fact coerced, and when it cannot be determined that such coerced confession was or was not used by the jury to arrive at their verdict of guilt, the writ should issue. But in the present case, the Trial Judge in accordance with the orthodox method, made expressed, specific detailed findings of the underlying facts as to voluntariness and admitted the confessions into evidence for the consideration of the jury as to its weight. In this orthodox method there can be no such vital flaw as existed in the *Gonzales* case. Further, the Trial Judge set forth the underlying facts upon which it resolved the ultimate conclusion of fact.

We submit, if your Honor please, that it is crucial in this case this Court has overriden the trial court not only on the ultimate question of fact but also on several underlying facts although these exact issues were raised and adjudicated in three separate state court hearings and presented to the Supreme Court on certiorari. The facts relied on by Rogers are not outside the trial record nor outside the Trial Court's finding, and their effect on the ruling of admissibility was open to consideration and review on appeal, and we cite in that connection *Whaley* vs. *Johnson*, 316 U. S. 101, 104.

In *Brown* vs. *Allen* at page 504, Justice Frankfurter warns that federal courts should not interfere with the state judiciary in the administration of its criminal law except in the most extraordinary circumstances especially when there has been a thorough

and scrupulous attempt by the state court to give the defendant a fair trial. And I cite language in that case where Justice Frankfurter says: "In some cases the state court has held a hearing and rendered a decision based on specific finding of fact; there may have been review by a higher state court which had before it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases."

Here in this trial the Court made painstaking examination of Rogers' claim, made specific findings of fact with respect thereto and complied exactly with the orthodox method of handling confessions. It would appear that the present case fits exactly within that class of cases described by Justice Frankfurter which I have just read. And again in that connection citing *Palakiko* vs. Harper, a defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies and then supersede these remedies on collateral attack by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them.

In *Daniels* vs. *Allen* it was held to justify a federal court in releasing in habeas corpus proceedings one convicted in a state court there must be such a gross violation of constitutional rights that the person convicted is denied the substance of a fair trial" and the Second Circuit has adopted these principles as the law of this jurisdiction. Citing *U. S. ex rel Caminito* vs. *Murphy*, wherein it was stated "I doubt the utility for dignified or effective law enforcement of review and overturn by any federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals."

And in *U. S. ex rel Murphy* vs. *Murphy* it is acknowledged "The district court has undoubted jurisdiction to entertain the writ, but the situations in which it is proper to exercise it are so rare that the effort almost never succeeds. 'Exceptional circumstances of peculiar urgency' alone can justify intervention and a bare constitutional question alone is not enough. Thus the Supreme Court has declared in many decisions."

In the present case it has been stated Rogers was represented throughout by competent and experienced counsel. The evidence was heard in the absence of the jury and heard at length. Although not taking the stand at the trial, Rogers testified at the hearing with respect to voluntariness and made no claim of course to the threat of force. As to his confession to the coroner, he made no claim whatever of coercion, either physical or psychological. And I say that under those circumstances we are not presented with a case where the established decision of the state courts should be overturned. In *Stein* vs. *New York* it is stated that "It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or to be tolerated by it if they do, that cause us to intervene, to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court."

And we state in this case Rogers failed to present proof sufficient to warrant this Court in overriding the judgment of the State Court and analysis of the four points on which this decision rests; first as to removal from jail without court order it has been stated he was unaware of it so it could have no causal relation to his confession and this Court recognizes it is not sufficient in itself to vitiate his later confession. On that point obviously the evidence is not clear and convincing.

(2) As to denial of counsel during police interrogation, this rests solely upon the testimony of Rogers and it is disputed by the testimony of four officers of the law. As it said in *Ashcraft* vs. *Tennessee*, "We know that police standards often leave much to be desired, but we are not ready to believe that the democratic process brings to office men generally less believable than the average of those accused of crime."

Besides the direct contradiction by the four officers that he asked for counsel, there is the further refutation necessarily inherent in Rogers' later failure to ask for counsel the following day when the Coroner explicitly informed him of his right to such counsel in language which Rogers readily admits he understands.

With respect to this crucial basic or underlying fact, this Court in finding that such a request seems most probable thereby directly repudiates the State trier who expressly found that such a request was not made. I submit that in such a case as this, particularly in the absence of clear and convincing proof by the relator this Court should accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process. Quoting from *Lisenba* vs. *California*.

And finally on this point even assuming Rogers did request counsel, this Court notes that denial of counsel during police interrogation does not constitute a denial of due process. So under these circumstances it certainly cannot be said Rogers has sustained his burden of establishing this claim by clear and convincing evidence and we accordingly ask the Court to reconsider its finding "that such a request was made seems most probable."

As to the matter of prolonged questioning, this Court has found that it was intermittent and not unremitting such as is to be found in those cases, wherein the United States Supreme Court has set aside the confessions. The intermissions were for the serving of food, coffee breaks, smoking, going to the men's room, telephone calls and checking by the police and a full hour's consideration by Rogers whether to confess. There was none of the pressure of unrelenting interrogation which was condemned in *Watts* vs. *Indiana*.

Also the police treatment of Rogers during the questioning period was most considerate. He was invited to eat and did eat with the officers. Later, when again asked if he wanted to eat he choose merely to take coffee. He was allowed to smoke and he did smoke, both his own cigarettes and Captain Eagan's and more cigarettes were brought in to him. Undisputed testimony for his Honor when he first expressed a desire to smoke one handcuff was released and one hand remained free during the remainder of the time. Much of this evidence is to be found in the transcript of Rogers' own testimony, if your Honor please.

He was seated in a comfortable armchair during the questioning and he concedes that the questioning did not confuse him.

Next, the questioning period falls far short of limits heretofore found unobjectionable by the Supreme Court of the United States. In *Lisenba vs. California* there was forty-two hours of questioning with lack of sleep by the defendant. *Gallegos* vs. *Nebraska*, prolonged questioning for five days. *Stein* vs. *New York* twelve hours of intermittent questioning. *Lyons* vs. *Oklahoma* questioning was from 6:30 P. M. to between 2:00 and 4:00 A. M. Those are cases in which the questioning period was held not so prolonged as to affect the situation.

Here in this case the questioning started at 2:00 P. M. and Rogers confessed shortly after 10:00 P. M. Although this covers eight hours of elapsed time, there should be subtracted from this total the one full hour during which Rogers considered whether to confess and what to claim in mitigation; and there should also be deducted the several intermissions heretofore referred to. Compare this time with cases cited above where the confessions were found voluntary and contrast it with cases where the Supreme Court has ruled the confessions involuntary. In the *Watts* case five night sessions with loss of sleep; *Turner* case questioning for four consecutive days; *Malinski* questioning on five days; *Harris* case questioning for twelve hours and two other sessions.

As was stated in *Stein* vs. *New York* "Interrogation is not inherently coercive as is physical violence; this Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive. Of course the process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief as to accomplish extortion of an involuntary confession.". Rogers' own testimony establishes that there was no such deprivation of rest, refreshment or relief and this Court has found that the questioning was not unremitting, that there were interruptions. It is stated in *Ashcraft* vs. *Tennessee* "Questioning is an indispensable instrument of justice . . . we cannot read an indis-

criminate hostility to mere interrogation into the Constitution without unduly fettering the states in protecting society from the criminal."

The fourth point as to the threat, there is no clear and convincing proof that that motivated Rogers' confession. We have already pointed out this remark was not a threat either by legal or dictionary definition and even if a threat, it cannot be said to be causally connected with the confession because it relates to someone other than the confessor himself, and moreover this Court properly recognizes that it was not such a threat as might be likely to cause a confession to a capital crime.

In considering whether Rogers has sustained his burden of proof by clear and convincing evidence, it should be observed here again we have only Rogers' bare claim that this remark coerced his confession and he refutes it himself when he testified that despite this threat he would not have confessed had he known that his wife could not be used as a witness against him. This is concrete evidence of Rogers' subjective intent and motivation in confessing. Note also that Rogers has failed to produce clear and convincing proof of any illness disabling his wife. The only evidence on the subject is Rogers' bald statement, and this is disputed by the State and is disproved by the actual fact of her daily attendance at the protracted trial without assistance. If this claim of illness were true I submit, if your Honor please, that proof would be altogether within Rogers' power to produce. It was altogether lacking at the trial and at the hearing before your Honor so how can it be said that Rogers has sustained his burden in that respect and we would ask your Honor for an opportunity to present actual evidence that during this period of time, January, February and March, Mrs. Rogers left her home readily and frequently which evidence has been newly-discovered and, under the circumstances, of this case we ask an opportunity to present it.

And further, Rogers' motive in confessing was his own self-interest and was the result of neither the threat nor concern for his wife. I want to say, if your Honor please, throughout the

labor which he used to consider whether whether to confess he had ample time to ponder the substantial nature of the proof against him. The murder gun was definitely known to be in his hands on the day of the murder; directly after the murder he falsely reported to the police that the gun had been stolen by persons unknown from his nephew; the gun was still in his possession on the night of the arrest for the crimes at the Hotel Travelers and then, after first claiming that he won the gun in a crap game he afterwards acknowledged that he had stolen it from the home of his nice shortly before the murder.

Reflecting on these facts, the weight of the evidence already against him, he considered, if your Honor please, some means of mitigating his plight and so he hit upon the time-worn expedient of putting the blame on liquor and the evidence upon that is to be found in Exhibit A, page 496. I have not inserted that in the brief. First, on liquor and second upon the victim who could no longer refute him. He first claims that he was drinking that night (that is Exhibit E page 496 if your Honor please instead of 487. 487 I might state was omitted. I believe Mr Robinson indicated that he was going to present all of Captain Eagan's testimony that was not included in Exhibit E and I believe that he omitted about eight or ten pages. This is on page 487 of that transcript but it appears again on page 496 so that the deficiency is not important.

He first claimed he was drinking that night and glory in his thirty page confession he invents an illicit relationship with the deceased culminating on the night of this crime in alcoholic [illegible] which furnished provocation for his shooting her.

I refer your Honor in that connection to Exhibit E page [illegible] and I should like also to present in evidence the confessions themselves so your Honor can see that immediately at the outset of the confession Rogers contrived or concocted this fantastic story in an effort to exonerate himself in part if not in whole and I should like also to have your Honor examine those confessions to see the manner in which Rogers gave the story, his narration, how he responded to questions. I think a study of the confession

is indispensable to the proper decision of this case. I might say those were his motives in confessing, the evidence against him, the weight of the evidence against him, the fact that he had an opportunity to contrive a story that would excuse him at least in part.

It is difficult to conceive of a confession that is not induced by a sense of self-interest. *State* against *Willis*, *State* against *Castelli* and *Stein* against *New York*. "The inward consciousness of having committed a murder and robbery and of being confronted with evidence of guilt which they could neither deny or explain, seems enough to account for the confession here . . . of course these confessions were not voluntary in the sense that petitioner wanted to make them— . . . but in this sense no criminal confession is voluntary."

We state, if your Honor please, the confession was the considered product of Rogers' mental processes. Without full mental freedom he would have been unable to concoct his elaborate excuses. Scrutiny of the confession shows that Rogers carefully considered what he should say and that also will disclose his statements are not merely supine attempts to give the desired responses to leading questions. It was not any threat by Captain Eagan, but his own self-interest that motivated this confession.

So I have referred, if your Honor please, to the four factors upon which this decision seems to be based and I now submit, if your Honor please, even assuming that these four factors had been established by Rogers by clear and convincing proof, they would not singly or in combination be sufficient under the law to render the conviction invalid. And I refer Your Honor to five cases wherein the combination of facts, many of them far more serious than those here, are held not to invalidate the confession: *Lisenba* vs. *California* where you have the feature of being held incommunicado; deprived of counsel; questioned in relays; physically abused; threats and promises of leniency; prolonged questioning for forty-two hours without rest or sleep; improper instructions to the jury; all these factors were present and the conviction was upheld.

In the case of *Gallegos* vs. *Nebraska*, prolonged questioning on five days; illegal detention for twenty-five days; held incommunicado; deprived of counsel and physical torture; all present and conviction affirmed.

In *Palakiko* vs. *Harper* you have the feature of illegal detention, unlawful removal from jail, concealment of prisoner, physical torture, public demonstration against prisoner and prolonged questioning. The conviction was upheld.

Stroble vs. *California*, the accused was deprived of counsel, there was delay in arraignment and illegal detention.

Stein vs. *New York* there was illegal detention, held incommunicado, prolonged questioning and many hours of intermittent questioning; physical violence and psychological coercion.

In none of these cases either a combination of these factors with others, too, present, was held sufficient to invalidate the conviction.

I submit also Rogers failed to establish by clear and convincing proof that his mental resistance was overcome and that he lacked sufficient mental freedom to make his confession voluntary.

As has been stated, it is clear from the evidence that prior to his interrogation on January 30, 1954 Rogers had had extensive experience with the police authorities. His brother was a police officer. He had been arrested four times prior to January 30. It can be presumed, I believe, that he was questioned by the police on the occasion of each of his earlier arrests and it is acknowledged as a fact here that he was questioned before on the night of his arrest for a crime at the Travelers Hotel and again on the following day and he acknowledges also he was questioned by the police on the very day following the murder when he reported that the gun had been stolen by his nephew.

I might state here this bold action of Rogers in seeking the police himself for the purpose of making a false report that the gun had been stolen by persons unknown demonstrates clearly that Rogers, by reason of his vast experience, was in no awe or fear of police officials.

Now as was stated in *Stein* vs. *New York* "what would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."

In that connection, if your Honor please, there was submission. I believe in the decision that no warning was given to Rogers. Of course under the law no such warning is required and I cite your Honor, in that connection *State* vs. *Castelli*, 92 Connecticut 58, 66, *State* vs. *Palko*, 121 Conn. 669 at 680 and also *Edwards* vs. *United States*, 223 U. S. 303.

And we would ask also, if your Honor please, the opportunity of introducing in evidence the statements made by Rogers to the police on the night of January 9 and in the morning of January 10 to show that in fact such warning had been given to him in the signed statement that he gave to the police on those occasions. So those warnings had been given to him on many occasions before. There were four arrests, and twice in connection with the arrest of January 9.

Paraphrasing the language in the *Stein* case, it may be said Rogers was not young, soft, ignorant or timid. He was not inexperienced in the ways of crime or its detection, nor was he dumb as to his rights. Neither the questioning nor the threat had an adverse effect upon him.

It should be observed Rogers' confession is not a brief acknowledgment of guilt. It is a thirty page document. This clearly indicates that he was not being forced to make an abject capitulation. His mental freedom is further demonstrated by his preface that he was drinking that night and further proof he was so far in control of the situation and of himself arises from the fact that he freely chose to invent out of whole cloth (1) an elaborately detailed story of an illicit sex relationship between the decedent and himself covering six months preceding the murder and (2) a claim of provocation for the murder falsely based upon abusive and profane remarks directed by the decedent to him. And I cite in that connection Exhibit F, page 29 which does not appear in the brief that your Honor has.

And I ask again that your Honor take occasion to examine the confessions themselves to determine whether he had mental freedom to determine whether his power of resistance was overcome and I assure your Honor that a consideration of all of these matters would reduce to absurdity his present claim that he was coerced into confession.

And of course we have the added observation which your Honor made quite properly that this Court recognizes this was not such a threat as would be likely to cause a confession to a capital crime.

We conclude in this connection Rogers has failed completely to sustain his burden of establishing by clear and convincing proof that his resistance was overcome and that the confession was not the result of his own free choice. Accordingly, we ask the Court add a finding that the confession was a product of his considered free choice and we ask the Court to amend its finding that at this point Rogers gave in because it implies that Rogers was at the breaking point, which is not the fact. Of course these confessions were not voluntary in the sense the petitioner wanted to make them, but no criminal confession is voluntary.

Now if your Honor please, referring now to the second confession, and I think your Honor will observe up until this point the brief has been concerned with only matters relating to the first confession, assuming, for the sake of argument that the first confession was inadmissible, the Trial Court, we submit, committed no error in admitting the second confession into evidence even assuming that the first confession was inadmissible because of the threat by Captain Eagan, the second confession to the coroner is admissible certainly at a retrial of this matter. Rogers obviously is not telling the truth when he claims this threat as the motivation for his second confession. At no point during the trial did Rogers make the claim that this remark of the previous day coerced the second confession and in that connection I refer you to the testimony in hearing on admissibility page 47 of Exhibit F and following. I again refer your Honor quite readily to defendant's claims of proof. Nowhere in his claims of proof which appear in the record on pages 11 to 13 did he make

the claim that the remark of the first day coerced his confession on the second day.

I again refer your Honor also in this connection, to show that this claim arose just at this hearing or at least after the trial was over, to the Defendant's requests to Charge because particularly paragraph 52(g) which cites fear of reprisal that this threat is only with relation to the first confession and nowhere does he say that this threat carried over to the next day. Such a belated claim cannot be convincing as a matter of fact; and as a matter of law, a relator cannot reserve a defense which he might have made at the trial and use it in a habeas corpus proceeding to attack a ruling of the trial court. Even assuming that such a claim could be made at this late date, it cannot command credence because of the circumstances surrounding this second confession. When Rogers was presented before the coroner at five o'clock in the afternoon, some twenty hours had elapsed since the threat was made. There was a different group of persons in attendance. Captain Eagan was not there. Instead of being transported by police officers, the High Sheriff and his deputies produced him. The tribunal before which he was brought was one specifically authorized by law. As I say, these differences in time and place and cast of characters impel the conclusion that the effect of this threat had been completely dissipated prior to his second confession and accordingly the second confession would be clearly admissible in evidence.

In *Lyons* vs. *Oklahoma* a first confession was concededly involuntary. A second confession was made twelve hours later in another place and with different persons present. The Court held the second confession properly admitted as voluntary, stating at page 603 that "If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact; and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process."

There is one further consideration precluding belief of the claim. The threat was to question his wife if Rogers did not confess. With Rogers' confession already a matter of stenographic record that threat lost all substance and relevance. There is, therefore, no basis for the inference that the coercive effect of the threat still persisted, and we submit this Court should not lend credence to this unsupported and tardy claim.

It should be observed too, that at the trial the attack upon this confession to the coroner was based on the claim that the accused did not understand from the Coroner's explanation that he was entitled to counsel and that he did not have to give any statement; that that was the claim I referred Your Honor to in Exhibit I pages 50 to 61.

I refer you to the defendant's claims of proof. I refer Your Honor to the defendant's request to charge and I refer you to the defendant's argument on admissibility of the confession which is to be found in the record.

However, it is most significant that even this claim of failure to understand the Coroner's warning was not based on any testimony from Rogers or anyone else. It was a claim gratuitously voiced by his counsel. In other words, neither Rogers nor his counsel made any claim at the trial that the fear of this threat prompted his second confession nor did they present any testimony that he was unable to comprehend the Coroner's explanation of his rights. So when Rogers is finally heard from on this subject before your Honor he expressly concedes that he did in fact understand the Coroner's statements that he didn't have to say anything and that he was entitled to a lawyer. This Rogers is now in the position of repudiating the principal objection proferred by his counsel against the admissibility of his confession to the coroner.

So we are left in the anomalous position that at the trial the defense objected to this confession on the ground Rogers was unable to understand the Coroner's explanation of his rights without offering any testimony in substantiation of this claim and made no claim whatsoever that the effect of the earlier threat

still persisted, while at the hearing on habeas corpus Rogers acknowledges his understanding of the Coroner's statement but claims that this second confession resulted from the continuing force of the threat the day before.

We ask in this connection the Court should strike its finding that Rogers confessed to the coroner still fearing the threat of the previous day.

We ask the Court strike its finding Rogers was advised pro forma of his rights because Rogers himself, in evidence, presents testimony to the effect he did, in fact, understand.

And we ask also that the Court find that this confession was given voluntarily.

I think at this point that is all I have.

The Court. We will take a short recess.

(Recess from 11:50 to 12:05.)

Mr. Robinson. May it please the Court, we prepared a discussion of the long fifty-one paragraphs, motion of the Respondents and I would like the opportunity to submit that at this time to the Court and to Counsel. We are also asking the right or the privilege of replying to the lengthy brief that was filed this morning.

Mr. Ullman. May I interrupt? I am at a disadvantage sitting behind Mr. Robinson. May I draw up a chair to this table?

Mr. Robinson. I would also like to request that I be given some information in the discussion which is to follow as to which rules this proceeding is held under, whether it is under Federal Rules 52 (b) or 59 (b) or whether it is to proceed under 60 (b) because of the different standards which apply to the discussion of the question of whether or not there is merit in the present motion.

Can you tell me, Mr. Ullman?

Mr. Ullman. I don't know them by numbers, but let's assume we are proceeding under all of them.

Mr. ROBINSON. I don't think you can do that.

Mr. ULLMAN. I don't know them by numbers.

Mr. ROBINSON. Your Honor will recall that this matter was decided on the 20th of September and shortly after its decision, disclosure was made by the State, or by the Respondents, that an appeal would be taken promptly, and then many days after the ten days provided for under rules 52 (b) or 59 (b), Rules of Federal Procedure, this motion is filed. Therefore, there arises at the outset of this proceeding, the question of the timeliness under the Federal Rules of this motion.

We intend, in the absence of some definition and we think perhaps we should be entitled to it, to discuss the appropriateness of the motion under both rules, so that your Honor may have it at the outset clear, and I think we have made it so in our statement that our procedure is going to be in that way.

So in opening our brief, we discuss the applicability of the sections of the Federal Rules mentioned to a habeas corpus proceeding. Your Honor will find that in the first paragraph of our discussion.

We wish at the outset to call attention to the claim that under a recent decision of this Circuit, the case of *Schaefer Brewing Company* against *United States of America*, what is the time of judgment has been decided by the whole Court. Now I have a copy of this that I would leave with Your Honor; I don't think it has been printed. Perhaps your Honor has it?

The COURT. I have it.

Mr. ROBINSON. Under the holding in that decision, the question in this case arises as to what is the day of judgment. The civil docket in this case includes the following notation: 9/20 Memorandum of Decision on Writ of Habeas Corpus entered. Smith, Judge. Judgment of Conviction may be set aside. Copies given State's Attorney and Thomas Robinson, Public Defender.

Then there is, as there was in the case of the *Brewing Company* case another notation when the formal judgment—which I think your Honor has before you—was noted on the docket. Now the only difference between the two notations so far as specifica-

tions was concerned was the substitution for a reasonable time when the Relator should be released if not given a new trial, was the insertion of a period of sixty days.

It's the contention of the Relator that the notation of September 20 constitutes an entry of judgment for the purpose of Rule 58 and that the Respondents' Motion is not timely under Rules 52(b) and 59(b).

We call attention to the language of this decision of Judge Clark, speaking for the whole Court, when he said: "As we have held, these rules contemplate some decisive and complete act of adjudication by the district judge; when this is done, and notation thereof made in the civil docket, the judgment is complete without other formal documents which, if filed, are ineffective to delay the judgment or extend the time of appeal.

"Appellant objects that the docket entry of April 14 does not show the 'substance' of the decision. Quite obviously it is not self contained in the sense that a casual and uninformed reader would know what adjudication had been made, or anything more than that a decision had been rendered granting the motion for summary judgment noted in earlier docket entries and that an opinion was available for the reading. But just as obviously, it was quite informative to the people involved, the litigants, their counsel, and, indeed, the clerk. The face of the entry itself would tell them all they needed to know at once of the fate of the case and the necessity of appeal, while the material referred to in the entry would afford the precise details when needed by the clerk to prepare a formalized judgment file, or by the parties to arrange to collect or pay the judgment. As a form of communication, therefore, the notation is wholly adequate to inform those for whom it was intended. It serves its real and obvious purpose of showing to these interested persons that the judge had arrived at a decision; for it is this reflection of the judge's state of mind which is decisive. Of course it lies in the judge's power to postpone finality whether because he has not yet reached the point of judgment or whether because he wants to take time, with the help of counsel or without, to embody the result in his own

prepared judgment. But when he shows adjudication, Federal Rule 58 provides for its simple and quick signification without delay for the elaboration so often cherished by winning counsel." And citation *United States* vs. *Roth*.

"Thus to look for the expression of judicial intent affords a reasonably clear touchstone as to the meaning and validity of docket notations of judgments. Of course this principle may not settle every case if trial judges are not careful to make a clear disclosure of intent, as they certainly should be urged to do. But judicial uncertainty may well postpone judgment, while satisfaction of some mere formality should not."

In the *Schaefer* case the court interpreted the April 14 notation as indicating an intent on the part of the district judge to demonstrate judicial certainty in the finality of the proceedings. In this case, since the question arises on a motion to amend and for rehearing, this Court must determine its own intent in regard to the meaning of the two notations. For Relator to contend for one intent before the very Court whose intent is in issue would be presumptuous.

And we don't say intent, but we do suggest an applying of external criteria of the *Schaefer* case, that it seems that all the criteria are present in the action of the Court in this case. There was a public pronouncement by counsel for the Respondents at the time the Memorandum was filed to the effect that an appeal would be taken, which indicates that the intrinsic standards of the *Schaefer* case have been met. The face of the entry as made would tell them all they need to know at once of the fate of the case and the necessity of appeal. These were met here and counsel for respondents, like the appellant in the *Schaefer* case, should not be heard to argue that the notation of the memorandum did not show the substance of the decision.

In summary, therefore, the question before this Court on the timeliness issue is essentially: Was the specification of "sixty days" in the formal judgment for "reasonable time" in the memorandum intended to postpone judgment or to satisfy a mere formality?

The immediate post memorandum announcement by counsel for respondents that the decision would be appealed, and the belief of counsel for Relator that the directive to submit form of judgment was a mere formality indicate that the parties inferred that by the Court memorandum of September 20 that this Court intended adjudication of the matter. If these inferences of the Court's intent are consistent with the Court's actual intent *in regard to the September 20 memorandum*, respondents' motion can not receive consideration under Rules 52(b) and 59. And I pause to note here that all of these attacks this morning have been made on the findings and on the statements in the discussion of September 20 and there is no attack on the form embodiment of these matters in the judgment file.

I call attention also to the well-known fact that under Federal Practice, the running of the time for taking appeals to the United States Supreme Court dates from the decision, the actual filing of the decision by the Court appealed from, and not from the very much later and subsequently made formal judgment file which constitutes the formal record of the judgment with a brief statement of the pertained facts.

So much for our discussion of this motion as to timeliness on the question, if it is made under these Rules which I assume it must have been by the effort to get it within ten days of the October 2 judgment file.

However, we contend, further, that if the motion is made under Federal Rule 60(b) it should be dismissed for the following and much lengthier list of reasons. If it is so, and this will depend, of course, on how Your Honor rules on this question of intention, that it can only be considered under Rule 60(b), the Rule provides for relief from a final judgment for five specific reasons contained in clauses (1) through (5) and for any other reason justifying relief in clause (6). Clause (6) is clearly a residual clause to cover unforeseen contingencies. And we cite *Klapprott vs. U. S.*, 335 U. S. 601 (1949) which indicates that clause (6) is applicable only to exceptional situations. In that case the motion was allowed because it was shown the movant had no opportunity

to interpose a defense. No such exceptional situation is alleged in counsel for respondents' affidavit in support of the present motion. So we took up the five specific reasons for granting relief under Rule 60(b), reasons contained in clauses (3), (4), and (5) are inapplicable, obviously. Counsel for Respondents make no allegations of fraud, void judgment, or satisfaction of judgment, the reasons contained in clauses (3), (4), and (5). Therefore, if this motion is considered under Rule 60(b) its allegations must be evaluated in light of clause (1) mistake, inadvertance, surprise or excusable neglect or (2) newly discovered evidence which by due diligence could not be discovered in time to move for a new trial under Rue 59(b). Paragraph 18 of the affidavit indicates that counsel has newly discovered evidence pertaining to the events of January, February and March of 1954. Since counsel makes no claim that this evidence could not, with due diligence, have been discovered in time to move under Rule 59(b), the motion can not receive favorable attention under Rule 60(b)(2).

Even under the broad standards of the first clause of Rule 60(b), the allegations by counsel for respondents are no basis for granting the motion. On application, a party has been relieved from an order taken against him as the result of an unauthorized stipulation by his attorney. Citing *Freeman* vs. *McCarthy*; a judgment of dismissal where the failure to file a bill of particulars was due to oversight or inadvertance of the clerk of plaintiff's attorney. Citing authority.

From a judgment of dismissal for want of prosecution occasioned by the inadvertance of plaintiff's counsel. And again citing authority.

From failure to serve a timely answer where failure was due to the fact that the one defendant believed he was represented by counsel of another defendent. With appropriate citation.

From failure to plead a former judgment as res judicata where the former action had been a class action and the plaintiff was one of several hundred employees in the previous action. Authority. Respondents' allegations clearly are not of the nature repre-

sented by the illustrations in the above cases, and should not receive favorable consideration under clause (1) of 60(b).

Therefore, since the affidavit's allegations do not satisfy the standards required under clauses (1) through (6) of Rule 60(b), there is no basis to grant the motion under Rule 60(b). The well established principles (1) that a final judgment should not be lightly disturbed, and (2) that the procedure of Rule 60(b) is not a substitute for an appeal. Citing *Ackerman* vs. *U. S.*, serve to emphasize that the motion should be dismissed if considered under this Rule.

Now calling attention, and may I say at the outset to your Honor that we have, in an effort to make more easily available for study the various answers made to the forty odd, fifty-one-odd paragraphs attached an appendix to the brief in which each particular paragraph of the motion is noted as to where it is discussed in the brief, both as to page and subdivision.

Now taking up the two-headed claim that is made here now, that this motion is made under all the three paragraphs of the Rule, let me digress for a moment. A motion for rehearing in habeas corpus proceedings is governed by Rule 59 (a)(2) providing for new trials in an action tried without a jury. A rehearing will not lie merely to relitigate old matter. A new trial will normally not be granted to enable the movant to present his case under a different theory from the one presented at a former trial. Authority.

Under Rule 59(a)(2) pertaining to new trials without a jury, the Court can give partial relief by amendments, which it is more difficult to do in jury actions. Therefore, the grounds for relief under 59(a)(2) and 52(b) are similar. The grounds generally are (1) newly discovered evidence, (2) surprise, (3) manifest error of fact, (4) manifest error of law. A detailed analysis of the 51 paragraphs of counsel for respondents' affidavit on the basis of the above criteria and in relationship to Rule 61, which admonishes the court to disregard harmless error, emphasizes the lack of merit of the allegations.

The paragraph of the affidavit referring to newly discovered evidence. In paragraph 18, counsel for respondents requests an opportunity to introduce evidence which evidence is newly discovered since the hearing of this cause in regard to Mrs. Rogers' state of health during January, February, and March of 1954, approximately two and one-half years before the hearing in this Court on August 31, 1956. The movant offers no claim that the evidence could not have been discovered by due diligence during the two and one-half year period. Authority. The Court dismissed a similar motion urged on the basis of newly discovered evidence because "... the substance of the evidence, the witness from whom or the sources from which it could be obtained, the diligence which had been exercised, and the reasons which prevented its production at the trial were not set forth even in a sketchy manner." And that applies particularly to this claim that there is new evidence that the respondents now wish to introduce before this Court. As a matter of fact, it is very difficult to comprehend how, with the vast machinery of the State's Attorney's office, they could not have discovered any in the duration of the trial of this cause, either at the original hearing where ample notice was given by the allegations of the petition for a writ or by the claims made during the course of the long litigation and it is only a last-minute thought, a last-minute scurrying around, I am sure that brings us in here to introduce new evidence, an effort to fill the gap that was due to oversight and neglect, and certainly not to negligence that was not within the legal sense free from culpability. It is not sufficient that counsel merely makes a statement of new evidence. Nor does he meet the other criteria of the Federal Courts. These were summarized in the *Cashman* case: "A motion for a new trial on the ground of newly discovered evidence must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show the evidence is not merely cumulative or impeaching; must show that it is material; and must show that it is of such character that on a new trial such evidence will probably produce a different result."

Therefore, the motion should not be granted on the basis of newly discovered evidence.

We take up the paragraphs in the motion which refer to surprise. In paragraph 26, counsel for respondents, in his sworn affidavit, claims surprise in regard to Rogers' testimony and this Court's statement that Rogers at the Coroner's office still feared that the threat to take his wife and children into custody would be carried out. That counsel for respondents was, in fact, not surprised is obvious from his own brief in opposition to Relator's Petition for Writ of Certiorari where he said: "Although petitioner makes no claim that any of these elements of prolonged interrogation, of being handcuffed or of threats to summon his wife actually attended his confession to the Coroner; he takes a position these occurrences of the preceding day carried over and infected his second confession." Now with his own exhibit he comes into Court and admits that he had no notice of that claim and still he has the temerity to swear on them that he is taken by surprise by that claim.

Also, Relator's reliance in the Petitions for Certiorari and for Writ of Habeas Corpus, on the case of *Leyra* vs. *Denno*, to the effect that the confessions were, in effect, but one confession also negates the claim of surprise in the affidavit of the State's Attorney.

Paragraphs of the Affidavit which refer to Factual Error: Several of the paragraphs in the affidavit deal with disputing facts or requests for new findings of fact. The paragraphs dealing with factual matters can be categorized into: (1) those dealing with the basic accuracy of statements, (2) those which are not disputed as being truth but which are misleading without amplification, (3) those involving connotations and or characterizations, (4) those which are contained in essentially the same form in the Court's Memorandum on Writ of Habeas Corpus and/or the contrary of which has never been claimed by Relator, (5) those which are of inconsequential significance in view of Rule 61 and or are not findings. Because of some necessary overlap in these

categories, the affidavit's allegations are not to be considered as exclusively being in one or the other of these areas.

Paragraphs dealing with basic accuracy of the statements. Paragraph 4 states that it is undisputed that the gun had been stolen from Rogers' niece's house on the very day of the murder and objects to the Court's finding that the theft was prior to the evening of November 21, 1953. The answer to counsel's allegation is in the testimony of counsel for respondents' own witness. "Officer Mulhern, when was the time that he claimed to have taken it with reference to the Kennedy murder?" Answer "It was on the night before the night of the Kennedy murder." So it is a little difficult to understand how, in good faith, such a claim could be made, an attack on your Honor's conclusion, when evidence of their own witness, the only evidence here, is as found in the transcript at the cited pages.

Mr. ULLMAN. Paragraph 4, the claim is "stolen by Rogers." That's the substance of that paragraph.

Mr. ROBINSON. In paragraph 5, counsel states it is undisputed that Rogers had made an admission to police prior to Captain Fagan's arrival. Officer Mulhern testified that there had been an unrecorded admission by Rogers before Captain Fagan arrived (Transcript page 88.) However, that such a making of an admission is not undisputed is obvious from the following testimony. Cross-examination of Detective Ruggiero: "Q. Up to the time Chief Fagan got there the investigation had been productive of nothing of value; isn't that so? A. That's right."

Question of Chief Fagan in the Connecticut Trial Court: "Q. And what had he said up to that time? A. Sergeant Mulhern told me, in the few minutes I talked to him there that they had talked to Rogers during the afternoon and had been unable to get any information from him." (Relator's Exhibit F, page 30.)

In paragraphs 6, 8, 9, and 15(c) counsel for respondents challenges the Court's finding in respect to the "eight hours" of questioning prior to Captain Fagan's arrival and "13 hours after the beginning of questioning." Rogers testified that he didn't know the exact time he left the jail (Relator's Exhibit F, page

40). However, he did state "I left the jail right after dinner, and then it was eleven, twelve. I must have gotten there around one o'clock." (Transcript page 40.) Rogers also testified that he left the court house "about twelve-thirty, one o'clock in the morning." (Transcript page 47.) Thus, the Court's reference to "13 hours" is an essentially accurate description of the interrogation period.

Although Rogers was not actually questioned during the first hour in the State's Attorney's office or during the hour immediately following Captain Eagan's pretended call to summon Rogers' wife, it would be inaccurate and misleading to subtract these hours from the length of interrogation period in view of Rogers' testimony concerning these periods and the admission by Officer Mulhern that it is sometimes much more effective in extracting information from a suspect to indulge in pauses. (Transcript page 82.) Rogers' testimony in regard to the two hour periods emphasizes the nature of those time periods. Direct examination of Rogers in regard to the first hour: "Q. And were you still handcuffed? A. Yes. Q. Both hands together? A. That's right.

"Q. Do you remember anybody saying anything to you during the first hour you were there?

"A. Nobody said nothing to me. They walked in and out of the other office and talked with each other, and came back and sat down and wouldn't open their mouths."

"Q. Did they produce a gun at any time?

"A. Yes." (Transcript page 42.)

Direct examination of Rogers in regard to the hour after the pretended call:

"Q. And what happened after Chief Eagan arrived? A. He said he was going to check my wife up and have her come down and have the two children and he picked up the telephone. I thought he was telephoning. He was talking to headquarters. Said 'Get a squad car ready to pick up Mrs. Rogers and have the matron pick up the two children and take them some place and keep them over night."

I pause to remark that these specials argued here by him offer no claim they were going to take that wife and children into

custody is directly contrary to what the man who is giving the orders says. You can quibble about picking up someone by squad car and picking up children and taking them to a place to be cared for and so on provided it is an act of maintenance, but the whole purpose is to enforce on this man something was to be done to his wife definitely, and notice is affixed against him as a man when Eagan says to him "You'll be less than a man if you let your wife come down." This is said late at night.

Then he goes on to say:

"'. . . Well, bring her down there for questioning, keep her down there overnight if necessary.' He said, 'You'll be less than a man if you let your wife come down' and I knew she was sick." (Transcript page 462.)

That is Rogers' testimony and that's confirmed by Eagan's statement, the one he made about he was less than half a man.

"Q. Did he say anything about holding it up for an hour?

"A. Yes, he said he would give me an hour; indirectly. He didn't say exactly that, indirectly, he didn't exactly say. He told them over the phone to hold that car for an hour, and he could call up and tell them directly when to send for her, gave me the impression he gave me an hour to confess.

"Q. Is that the reason you gave him this statement?

"A. That's right."

Cross-examination of Rogers in regard to the hour after the pretended call:

"Q. Did you use the whole hour to consider whether you were to confess?

"A. That's right.

"Q. And at the end of that hour, after the hour's consideration, he went to the telephone, picked up the phone, and was it then that you made the confession?

"A. That's right.

"Q. And that was because of what he said to you about your wife?

"A. That's right.

"Q. Coming down?

"A. That's right."

I don't see how the Court could have arrived at any other finding than that expressed in the finding objective.

Paragraph 15(n) states that aside from Rogers' present claim, there is no proof that Mrs. Rogers had an arthritic condition. However, in the Connecticut court Rogers testified that she had arthritis. "She couldn't hardly walk." (See Relator's Exhibit F, page 46.) Also, Officer Mulhern knew Mrs. Rogers had been sick. (Transcript page 76 before your Honor.)

Paragraphs 45, 46 and 47 concerning the use of Rogers' wife against him. In 46, counsel for respondents states that it is undisputed that Rogers was motivated into making the statement because of the belief that his wife could be used against him. On direct examination as well as cross-examination in the Connecticut trial and in this Court, Rogers testified that he made the confession because he was afraid that Captain Eagan would bring his sick wife into custody. (See the cited portions of the transcript and exhibit.)

Paragraph 20 states it is undisputed that Mrs. Rogers attended the trial without assistance. This is inaccurate in view of Rogers' testimony that his niece assisted his wife.

Paragraph 19 stated the Relator introduced no corroborative evidence and is inaccurate in view of Officer Mulhern's admission that he knew Mrs. Rogers had been sick.

In paragraph 36, Counsel for respondents challenges the finding that Rogers requested to see counsel at the State's Attorney's office because of the words "seems most probable." This Court left no ambiguity on this point for the finding stated, "and the Court finds it (the request made by Rogers) was made." The Connecticut trial court found to the contrary but that finding is not binding on this Court, particularly since it was made despite Rogers' uncontradicted testimony in regard to his two early requests for counsel. The State did not elect to challenge Rogers' testimony on this point with the available detectives

until almost two and one-half years after Rogers testified. And the reason for that I am quite confident may be inferred, for the fact my friend was in the Court where never in the history of this State has a confession, no matter what the circumstances have been, to my knowledge so far as I know today, or that day, excluded. Here he was taken perhaps off base in the assumption which he explains in his closing words to your Honor that he was so sure of himself he asked your Honor in his last sentence here in the argument on the 31st he asked to be noticed when your Honor decided against the relators to deny us a certificate of reasonable doubt for the purpose of appeal. Now having had the light of this Court's decision, and I say that with the utmost deference, because it has not only been a light, but refreshing to all persons, for the administration of justice it seems to me, from the standpoint of the layman and persons engaged in the effort, sometimes it is a difficult and a painful one to protect against the machinery of the State, to have the realization dawn upon us that there is a Federal supervision, a system of Courts, and I say this with the utmost sincerity, where the Bench is fearless to decide matters of the kind decided in this Court. A refreshment that comes by having this realization that here in Connecticut, hide-bound as we have been, where the matter has gotten to such a stage that this morning we have here the State's Attorney for one of the larger counties in reference to a decision of a Court of Connecticut, to say the least and put it mildly, "misstated" in its decision on this other matter in applying a rule which he does not himself contend for, before your Honor. He hopes to have some rule down the line which merits instruction to the jury for his wording on that question that was involved take the sting out of the fact, that is without any question. Now on his own admission the Supreme Court was in error in upholding this confession if not in so many words, certainly by applying the rule as your Honor so properly pointed out as not the federal rule—this question of truth or falsity test. I think it is very interesting and refreshing to have this matter abandoned.

Mr. Ullman. I have not abandoned it. I said assuming if the Supreme Court of Errors misstated the law.

Mr. ROBINSON. Are you through, sir?

—I say it is refreshing and it is a healthy and a wholesome thing to have throughout this community that realization that one courageous judge, in spite of the number of times this question has been debated, or looked upon and examined, to take the ground that your Honor did and I am quite sure, in reference to the matter I am at present discussing, the findings of your Honor are just as sacred and just as sacrosanct as those of any trial judge in the midst of the jury trial and that this attack on 51 departments of them is not only untimely but indicates also apparently that the first effort to bring relief to the respondents was to take an appeal that for some reason or other that has not been followed. It undoubtedly is due to the fact that these questions of fact that they are now urging should be completely, should completely re-write your Honor's findings, they would get nowhere with on an appeal and that this is an effort to make some sort of a situation from which they could get relief; and what relief do they want? The urged in the opening paragraphs of this motion that your Honor's decision is such that if it goes unchanged or un-upset the administration, the investigation and the prosecution of criminals in this community will be hampered.

In other words, they are inviting a situation where, what your Honor up to the present has found as a violation of the relator's fundamental constitutional right to a point that he isn't working to free, he simply has been given an opportunity for a trial that will void these errors that are complained of, that if that rule is sustained they will be no longer able to violate constitutional rights, to impose upon and to oppress little people—to him they are suspects—and get away with it. So I say that in view of the effort to have your Honor change all of these paragraphs I am tempted to make these strictures because many of the citations thereon in the Brief have to do with the releasing of people who have in some way been tread upon.

Your Honor's judgment that they complain about is simply the granting of a new trial.

Now without omitting the claims as set forth in our memorandum I will continue: Paragraph 45, 46 and 47—no, paragraph 20—I don't want to repeat myself. I have only one brief to read. I am going to start on page 13.

"Paragraphs which are not disputed as being untrue, but which are misleading without amplification.

Paragraph 15(1) or (i) states "at no time did Rogers request to see Mr. Robinson or Mr. Corse." This statement is true only if the statement is read: "At no time did Rogers request to see Mr. Robinson or Mr. Corse by name." Rogers testified in the Connecticut trial court and in this Court that at least three times he wanted to see his lawyer. (Transcript, pages 45, 50, 54, 55.) Page 55 of the transcript says that matter was expressly called to the attention of Mr. Ullman and again it is a little difficult to see how there can be a frank statement of a claim made in this wise.

Paragraph 28 urges the Court to change its finding that at the Coroner's office "he was for the first time warned of his rights" because of Rogers' prior arrests, the fact that his brother was a police officer, and because the Coroner thought Rogers was acquainted with the law in a general way. Assuming the truth of these allegations, they have no relevance to the finding attacked unless that finding is read "he was for the first time in his life warned of his rights." In context, it is obvious the finding refers to events of January 30 and 31, 1954. Rogers was not warned of his rights. Even assuming this highly unlikely "in his life" meaning, there is nothing to indicate Rogers, who testified he was about 23 years old at the time of the arrest prior to the minor 1949 charge, had been informed of his rights at any of his earlier arrests.

And the claim I have here made now is that if allowed the relators, or the respondents, will attempt to show on other instructions he was given some sort of a warning.

Paragraph 15(m) states that none of the interrogators had any knowledge that Mrs. Rogers had an arthritic condition. Although

this statement is true insofar as it limits knowledge to the specific disease of arthritis, it is misleading without amplification. Although not specifying the name of the disease, Officer Mulhern admitted that he knew Mrs. Rogers had been sick. (Transcript page 76.)

Paragraphs 15(j) and (k), counsel for respondents states that Captain Eagan told Rogers he was going to bring Mrs. Rogers down since she might have some knowledge concerning the subject matter and that Captain Eagan never promised that if Rogers confessed his wife would not be questioned. These paragraphs ignore (1) any explanation of how Mrs. Rogers was in actuality to be summoned for information since the officer talked to no one and (2) Captain Eagan's testimony that the purpose of the faked call was to impress Rogers with the advisability of giving a statement. And then also is the statement again, and I repeat it, "you will be less than half a man if you let me bring her down." Now what sort of sophistry is that? What sort of sophistry that claim in the matter, that rippling path in the matter of fundamental freedoms and constitutional abandonment that this sort of quibbling should be urged upon your Honor, under oath, to change the obvious intent of that instruction now to something that nobody else, nobody could find any reasonable basis for it if it wasn't the basis that your Honor found in your very well-reasoned memorandum.

Paragraphs involving connotations and or characterizations. Paragraph 21 objects to the use of the words "gave in." In view of Captain Eagan's testimony that Rogers maintained his innocence from the beginning of the interrogation in spite of being confronted with the ballistics evidence, until Eagan reached for the telephone to pretend to summons Rogers' wife.

We again claim that the Court's characterization is perfectly proper and would not be complained of by anyone in any court. Once again my friend argues that same point, that he was prosecuting someone. "Why did he do this?" "Why did he do that?" He gave in to the threat. He gave into the threat, he committed this murder or committed this declaration because of the threat.

It is a perfectly proper conclusion for your Honor to arrive at and it should not be argued for any of the reasons specified.

Paragraph 27 objects to the use of the words "pro forma" by this Court in its finding. As a matter of fact, my friend or his assistant has not read your Honor's decision very carefully because "pro forma," does not appear in your finding of fact at all. It does appear in the discussion where you state that a "pro forma at least," so that he is not attaching a finding here, he is asking the privilege in a small way albeit, to re-write your Honor's discussion of the issues in the case. And then again it was justified by the Coroner's own statement that he gave him the "stock" warning. If "stock" doesn't mean "pro forma" in most persons' mind I am at a loss to know why one should be criticized for not shading the meaning if there is any other reason. I don't believe there is a "stock" warning as a "pro forma" warning and if the Court had ruled the conclusion on the trial was improper because the word "stock" was used and my friend had changed it to a pro forma warning I am quite sure he would be the recipient of a motion by the Court, the matter had already been ruled upon.

Paragraphs 7 and 3(c) object to this Court's use of the words "intermittently" and "prolonged." Since "intermittently" does not infer "continuous throughout the entire period Rogers was in the State's Attorney's office" and since Officer Mulhern admitted that the pauses were not to give Rogers a "breathing spell," this Court's characterization is appropriate.

Paragraph 10 objects to this Court's use of the words "in relays." Since Rogers testified that he was questioned by the police, "one after the other," which was not denied by the police officers, the Court's characterization is also not to be appealed.

Paragraphs 12 and 13. This objects to the use of the words "brought in" and "into custody" in regard to summoning Rogers' wife and foster children. I am not going to read that transcript of what he told Rogers and what Rogers understood him to mean. He was going to take her there and keep her all night; if he is going to keep her how is he going to keep her? Is she in custody or isn't she? If he's going to take the children to the

children's building, which everybody knows is a place of detention, are we going to quibble over whether this is custody or whether it is not?

I think these two paragraphs are a fair sample of the profligate and absolutely unfounded way that these attacks are made upon your Honor's findings and conclusions. Chief Eagan used the words "bring his wife down." Now certainly, Rogers, handcuffed to the chair wasn't going to be sent out to get her. "Call his wife down," that certainly isn't what Eagan meant, that Rogers could go to a telephone and call his wife down. "Bring your wife down" that's what he said. Whether he intended to do it now or not I don't know. He said now, he didn't say later on. My experience indicated quite the contrary if he thought he would accomplish anything by it.

Paragraph 11 objects to the finding that "until he confessed he was kept unavailable to his counsel." In view of the finding that Rogers asked for his lawyer and the admission, despite the denial that Rogers asked for counsel, by at least one of the officers that counsel would not have been notified anyway, is quite proper and should not be disturbed.

Paragraph 15(d), 17, 32 and 33 refer to characterizations or opinions by state's witnesses of the questioning periods and Rogers' reactions, which are adequately characterized by this Court in the Memorandum or Writ of Habeas Corpus.

Paragraph 15(e) and 34 refer to the fact that questioning did not adversely affect Rogers. This is an inaccurate conclusion insofar as it ignores the fact that the activity of the questioning periods resulted in a confession for a crime for which the state seeks Rogers' life. Insofar as it refers to only the mouthings of the questions, it ignores the totality of circumstances by which the exaction of confessions must be measured.

Now, paragraphs which are contained in essentially the same form in the Court's Memorandum and/or the Contrary of which has never been claimed by relator, and I am not to read this by name and number as your Honor will undoubtedly study it.

These are claims which, in view of Rule 61, are unwarranted because the information is essentially contained in this Court's finding and/or the contrary has never been claimed by Relator.

Five, paragraphs which are of inconsequential significance, irrelevant, or are not findings.

Paragraph 23 and 27 request amendments to the finding. Since both of the challenged characterizations are not in this Court's finding, but its discussion section of the memorandum, the requests are without merit.

Paragraphs 42 and 43 state that Rogers took a full hour to confess, started his statement by "I was drinking" and made up the story out of "whole cloth." Such facts, however, are no basis for a finding that the confession was a product of Rogers' free choice.

The COURT. We will suspend at this time until 2:00 o'clock.

Afternoon Session.

2:00 o'clock P. M.

Mr. ROBINSON. In resuming, may it please the Court, paragraphs 40 and 41 concerning the Respondent's motion, concern the threat on the part of Captain Eagan in regard to the faked telephone call.

Mr. ULLMAN. What page is this?

Mr. ROBINSON. 16.

Mr. ULLMAN. 15?

Mr. ROBINSON. Now I suppose that was stricture that there has been no authority cited for the general claim that the overwhelming weight of such authority is against holding such a performance as a threat, has been at least attempted to be met by the filing of the brief this morning, the examination of it and the discussion held there on, rather indicates this, that there are or apparently are and we have not had an opportunity to examine them or distinguish these authorities; he submits that words alone of any nature comparable to these are not in and of themselves under certain circumstances a declaration of anything else than

an intention to do something. Under the circumstances as they existed here it was quite proper that in view of all the circumstances that the true nature of the performance by Eagan in connection with his presence there where he had been summoned because nobody else was getting very far with the interrogation, the words used, the circumstances surrounding them rather were a great deal more than a declaration that "we are going to interrogate your wife." The purpose was to get Rogers to confess. That was stated by the witness testifying before your Honor, and as shown in the transcript, the exhibit. That was the very purpose it was effective. The claim, I repeat it now, that this was simply a question of police integrity to interrogate all wives is entirely unsound under the circumstances and the effect of statutory admissions by the Relator was summed up by the claim of Eagan that "if you let your wife come down you will be less than half a man." Such a characterization as is contended for by the Respondents ignores the situation in which Rogers was placed and ignores the fact that the other purpose, the affective purpose was to get from him, to ring from him a confession.

Now taking up the paragraphs left undiscussed at this point of the motion, in paragraph 2 and 48 the claim is made that the voluntariness of the confession had been passed upon and sustained at three successive stages of the proceedings. In view of the fact that counsel for respondents specifically states in paragraph 49 that the jury did not determine the voluntariness of the confession, the three successive stages referred to can only mean that the trial court, the Supreme Court of Errors and the United States Supreme Court passed on the voluntariness. However, the Supreme Court denied certiorari without reasons therefore. The contention in these paragraphs therefore, ignores the settled law that denial of certiorari by the Supreme Court does not reflect on the merits of the petitioner's case.

And your Honor I call attention to the early stages of these proceedings and to the citation of *Brown* vs. *Allen*, and I have just read a section from Judge Frankfurter's opinion, dissenting opinion I believe, with the concurrence of other members of the Court, that this is precisely what the Supreme Court of the United

States did announce and wished to announce. Denial only means that for undisclosed reasons there were not four members of the Court who thought the writ should be granted, and what those reasons are or what they may have been or may not have been is a matter that in no way implies an adjudication of the merits. My friend has stated on other occasions, he does not seem to repeat it here because I think counsel guiding him is wiser, that that decision meant, the denial of certiorari mean there was no federal question involved. Obviously that is unsound and there is no adjudication of the merits. And the hearing before this Court should not be influenced and I am sure shall not in any way by the actions of the Supreme Court of the United States.

Paragraphs 37 and 38 have to do with the scope of the review on habeas corpus, with the finding, that they request amendments to the finding to the effect that there was considerable other evidence to convict and that Rogers did not take the stand except at the preliminary hearing. Such requests ignore the established law that habeas corpus proceedings are not to be used to try the general issue of guilt or innocence. These considerations are only proper in such a proceeding. Therefore, Rogers' claim and this Court's conclusion that he was denied due process of law cannot be effected by the information contained in these paragraphs of the motion.

Now as to the determination of voluntariness. Paragraphs 49 and 50 and 51 involve the standard of voluntariness as applied by the Connecticut courts. Counsel for respondents concedes that the Supreme Court of Errors applied an improper standard, but states that the Connecticut trial court applied a proper test of voluntariness. Counsel offers no evidence that the trial court did not follow the law as established by the Supreme Court of Errors. Although the trial court did not define voluntariness when the confessions were admitted, there is language in the charge to the jury to indicate that it, too, was applying a truth-falsity standard. The trial court told the jury, "The rules which surround the use of a confession are designed and put into operation because of the desire expressed in law that the confession, if used, be probably a true confession.

Again returning to the confusion, if there is a confusion, by which a true confession is made synonomous with a voluntary confession. Certainly that was the language of the Supreme Court in deciding this case.

That counsel for respondents himself urged a truth-falsity standard is obvious from the following coloquy at the trial level:

"Mr. ULLMAN (State's Attorney). There is no risk of (accepting) a false confession. I don't think (that) the accused is ready to make a claim that this was an untrue confession.

"Mr. CORSE (Assistant Defense Counsel). The authorities on this matter—are universal that it is not the truth of the confession that is in issue, it is the voluntariness of the confession. The truth is entirely irrelevant.

"Mr. ULLMAN. I don't know about that. The Supreme Court in several of its cases don't know it either.

"Mr. CORSE. You're talking about ours?

"Mr. ULLMAN. Our Supreme Court."

Connecticut Supreme Court Records and Briefs A339, p. 396.)

Even if the Connecticut trial court did evaluate the circumstances surrounding the exaction of the confession from proper standards, this Court must make its own determination of voluntariness. *Brown* vs. *Allen*, which your Honor I think adverted to in your decision.

Counsel for respondents in paragraph 40, attached particular importance to the point of the standard of voluntariness because of the Court's statement that a jury request for a charge in regard to voluntariness was disregarded. Counsel states that trial court properly determined the voluntariness and that the jury considered the weight to be given the confession. However, in his brief in opposition to the Petition for Certiorari, counsel for respondents stated, "Two courts and a jury determined that the confessions were made freely and voluntarily." (Respondents' Exhibit 1, page 3.)

The totality of circumstances: In paragraph 44, counsel for respondents quotes this Court's opinion that the threat "might

not be likely to cause a confession to a capital crime," but ignores the preceding clause, "separated from the surrounding circumstances." The omitted language emphasizes that this Court properly evaluated the confessions from the totality of circumstances surrounding their exaction. And we call attention to *Leyra* vs. *Denno*, with its cited authority. That this Court was evaluating the events of January 30 and 31, considering their cumulative effect on Rogers is clear from its ruling at the hearing on the admissibility of items such as (1) the State's Attorney's letter showing illegal removal, and (2) testimony to the effect that Rogers was prevented from seeing his attorney. (Transcript pages 11 and 18.)

The statements in paragraphs 3(a), 3(b) and 3(d) to the effect that an individual item did not in itself deny due process of law cannot, therefore, support counsel for respondents' motion.

In concluding we call attention to the effect of this decision. The statements of paragraph 1 concerning the belief of counsel for respondents as to the effect of this Court's decision on New Haven County law enforcement do not merit granting the motion. Insofar as that paragraph infers that the decision implies that law enforcement in New Haven County must assure the criminally accused the standards of due process of law, Relator offers no criticism. That that is the proper meaning is clear from this Court's discussion which states, "Constitutional safeguards would be weakened by a finding that confessions so obtained may be considered voluntary and in accord with present concepts of due process of law."

The second confession. Paragraph 35 asks the opportunity to reargue the law on the second confession. This Court specifically found both confessions involuntary in its finding, but in its discussion wrote that the second confession was of doubtful admissibility. Since a single voluntary confession used in evidence even in the presence of other evidence sufficient to convict will invalidate a conviction, citing *Leyra* vs. *Denno*, *supra*, there is no justification for reargument or a new finding on this point.

In summary, therefore, in view of the fact that every opportunity was allowed for counsel for respondents to fully present his case at the Hearing on Writ of Habeas Corpus before this Court and that movant has failed to meet the requirements of the applicable rules, Relator respectfully prays that the Motion to Amend and Supplement Findings and for Rehearing be dismissed.

And as I said at the outset, I would ask an opportunity to reply to the brief in favor of this motion within a reasonable time.

The COURT. Would one week be sufficient?

Mr. ROBINSON. I think so, yes.

Now I believe also that we should, before anything further is done in the line of proceedings with testimony particularly in view of the fact that Rule 8(a) of this Court has not been complied with by noting on the notice of motion the testimony that is to be offered in support of that motion that the matter should not go further than argument until it is decided that a rehearing should be held.

Mr. ULLMAN. If your Honor please, as to the first point in which it is claimed by the Relator that it is doubtful if the motion is timely under the rules, I'l like first to point out that this judgment was actually entered on October 2 and the order is that unless Relator is granted a new trial within sixty days after the date of the judgment or within sixty days after receipt of a mandate affirming this judgment, appeal is taken that the relator be discharged from custody. That judgment is dated October 2, 1956 and was filed and entered on that same date so that the time limitation for appeal and we submit as well as for motions, runs from the date of the judgment, the date of the entry of judgment on October 2. Everything starts running from that date.

The Judge, in his decision, is postponing finality in asking at the end of that decision form of judgment in accordance herewith may be submitted promptly by counsel for the relator.

Now that comes squarely within the language of the decision cited in the *Schaefer* case, cited on page 3 of Relator's brief at the bottom thereof. It says on page 3: "Of course it lies in the

judge's power to postpone finality whether because he has not yet reached the point of judgment or whether he wants to take time—with the help of counsel or without—to embody the result in his own prepared judgment."

Now that was not done, not finally accomplished, until October 2. I understand—I don't know whether your Honor can say, but I understand that more than one form of judgment was actually submitted to your Honor before this one was finally approved.

Mr. ROBINSON. That is not so.

The COURT. I don't recall at this time.

Mr. ULLMAN. I have reason to believe that is so. It might have been submitted to the Clerk rather than to your Honor.

The COURT. I believe that one form was submitted and that a change was substituted in that one form which was typed into the original form.

Mr. ULLMAN. Thank you.

That is as we understand it so that the judgment had not achieved that finality which starts the running of time for either motions or for appeal and I submit, if your Honor please, that it would hardly be likely that there would be a different starting date for taking an appeal or for starting a new trial. It is hardly likely there would be a different starting date for that, than there would be the filing of the motion.

If your Honor would like, I will be glad to furnish a brief on that point.

The COURT. I should think that the time would be the same to start the running of the time both for the motion and for the appeal. However, if the motion was not timely filed it would not hold the running of the appeal.

Mr. ULLMAN. If it what?

The COURT. If the motion was not timely filed, it would not toll the running of the appeal.

Mr. ULLMAN. I am addressing myself now to that.

The COURT. As I say, I think you are correct in your feeling that the time would be the same on both, the effective time of the judgment. The question I would think is not the language

of the second ntry file but whether the language of the first one was final in this *Schaefer* case and I would appreciate your incorporating an argument on that in your reply brief.

Mr. ULLMAN. I think your Honor will recognize the *Schaefer* case, that was a case for motion for summary judgment where nothing further would be required. In other words, there was finality there, as there was not in this case.

The COURT. The opinion in the *Schaefer* case came down in September, of course, and was not available to the Court here until after October 1.

Mr. ULLMAN. We were in the same position, if your Honor please.

If your Honor please, addressing myself now to some of the points raised by counsel in his argument, first as to paragraph 18, that is our paragraph 18, wherein we stated we request the Court to amend its finding that Mrs. Rogers suffered from arthritis but was able to attend the trial, on the ground this implies on the day of the confession Mrs. Rogers was unable to move about but at the time of the trial she surmounted all her difficulties and suffered to appear, which statement has no basis in fact and is refuted by her actual attendance at the trial.

Now I will concede that Rogers makes claim that his wife had arthritis. I will concede that he makes the claim that she could hardly walk, but that is not by any means proof of the fact and it certainly isn't proof of it by clear and convincing evidence such as required in this hearing.

The COURT. I think that the implication of the wording attacked there is quite the opposite from what counsel draws from it. I think the implication is that at worst she wasn't in such bad shape that she couldn't attend the trial.

Mr. ULLMAN. But by saying that she was in such shape she could attend the trial, I think there is an inference that could be drawn even though that wasn't intended or that wasn't the situation on January 30 and so I say that the crucial date is January 30 and there has been no evidence produced by Rogers besides his own claim and I say the proof is within his power. He can either produce his wife or doctors as witnesses or any other per-

sons and so I say it is a definite failing on his part to go ahead and sustain the burden or proof that is incumbent upon him. And so I say not having proof, that we are naturally taken by surprise in that the Court has not required the burden of proof that we would expect the relator to have to sustain in a hearing such as this, so to that extent we are taken by surprise.

We can show, if your Honor please, that in January, February and March Mrs. Rogers went out and visited the jail, for example, day after day after day on every visiting day that was available to her, twice a week, during that period of time, without assistance and without apparent pain and your Honor is aware of many people who for years have been suffering from arthritis who don't permit it to cripple them or prevent them from taking care of their daily duties. The only possible corroboration that counsel can claim as to Rogers' own statement is that Sergeant Mulhern said that one day when he went up to see her, sometime prior to January 30, and the date isn't fixed in my mind—that she claims she was sick but she was up and about at the time, but it is important to prove to your Honor, I submit, not only that she had arthritis but also its severity and its extent, to what extent did it cripple her or disable her to make it a hardship for her to come out of the house.

I say that we can show that she did go out of the house at least for the purpose of visiting the jail and it seems to me that that is evidence that your Honor would like to know about and would like to hear about and certainly the Supreme Court has always held that evidence of that sort is most essential. We still don't know, if your Honor please, whether this remark of Captain Eagan is claimed to have become a threat merely by reason of the illness of his wife or separate and apart from that is it claimed to be a threat?

I want to make reference to that a little later in my discussion here today. At any rate, we still don't know whether that becomes a threat by reason of her condition and if it is by reason of her condition certainly we should expect the relator to produce clear and convincing proof of her condition.

Now counsel, with some apparent relish, seems to charge that we have committed perjury in paragraph 26 because I state, as he claims it, in regard to Rogers' testimony and this Court's statement that Rogers, at the coroner's office, still feared that the threat to take his wife and children into custody would be carried out, and he quotes against me my own language in Respondent's Exhibit 1, page 6, that although petitioner makes no claim that any of these elements prolonged interrogation, of being handcuffed, or of threats to summon his wife actually attended his confession to the coroner, he takes a position these occurrences of the preceding day carried over and infected his second confession." I am reading from the petitioner's brief on page 8. So he says I wasn't taken by surprise. My claim in paragraph 26 is that because at the hearing on the admissibility of his confession to the coroner in the Connecticut Trial Court no claim whatever was made that Rogers had any fear of this alleged threat at that time. I claim, if your Honor please, the evidence to that, that never at any time prior to this hearing had any claim been found by any evidence, certainly by Rogers or by anybody else that his second confession, his confession to the coroner, was induced by this persisting threat. I claim surely, I acknowledge that counsel, after he had started on appeal, conceived that claim and it was then that it came into the picture for the first time but not at all during the trial of this case.

On page 9 of petitioner's brief he refers to paragraph 4, states that it is undisputed that the gun had been stolen from Rogers' niece's house on the very day and objects to the Court's finding that that was prior to the evening of November 21, 1954.

Paragraph 6, the language that I use, it doesn't make any difference it seems to me whether or not it was stolen on the very day or preceding day. As a matter of fact, counsel notes it was on the very day, but the thing that I would like to have added is that it was stolen by the petitioner because it is essential to have that fact in because that added to the enormity of the evidence or at least to the suspicion against this accused, so that I say that we are entitled to have that and the Supreme Court always wants to know what other motivating factors, aside from those claimed,

by the accused, induced the confession and I say that high among these motivating factors was the realization by Rogers that the State could put and he acknowledged that that weapon was in his hands on the night of the murder and presumably at all times since, up until his arrest on January 9.

Referring to paragraphs 6, 8 and 9 which petitioner and counsel discussed, page 10 of his brief, that relates to the eight hours of questioning and the thirteen hours after the beginning of the questioning. I say that if one of the factors of this case is prolonged questioning, we should know how long it was. We should know that the questioning began at 2:00 o'clock and six hours later Captain Eagan arrived so that that should be six hours, instead of eight hours we submit, if your Honor please.

We claim also that taking counsel's own statement that Rogers arrived at the State's Attorney's office at one o'clock and finally left at 12:30 to 1:00, that at the most that is 11½ hours and can't, by any stretch of the imagination or of the facts be deemed to be thirteen hours.

So I say that the significant thing, if your Honor please, is not what time he left for home, but what time the questioning started and what time the confession was made and I say that that was shortly after 10:00 o'clock so that the elapsed time between the taking, the beginning of the questioning and the confession is at most 8½ hours and I say that one hour should be taken off of that because the hour just before the confession there were no quetsions. That is admitted. And I say that out of that also should be taken all of those recesses, interruptions for food, coffee, telephoning and so forth. So I say that it is essential that those findings be clarified.

On page 12 of the petitioner's brief, I think I have discussed that when I talked about Rogers. As I say, it is not just a matter of arthritis; it is the extent of it, the effect of it, whether it has, whether it could preclude her from atending this questioning interview.

In paragraph 4 petitioner states counsel for the respondents states that it is undisputed Rogers was motivated in making his

statement because of the believe that his wife's testimony could be used against him. On direct examination as well as cross-examination in the Connecticut Trial Court, Rogers testified he made the confession because he was afraid Captain Eagan would bring his wife into custody. Well he didn't make that claim at the outset. The claim was that he didn't want his wife brought down for question, not to take her into custody. He didn't want his wife brought in for questioning not because she was sick, but because he was fearful of what she might possibly say that might tend to incriminate him as to where he was on the night of the shooting and as to any other conversations they may have had, and it appears definitely if your Honor please, Chief Eagan was interested in finding out whether he talked to his wife because it is in evidence here before your Honor that Chief Eagan asked "Did you talk to your wife about this?" And it certainly would be inconceivable if the police wouldn't ask questions of Mrs. Rogers as in fact they ultimately did, so I say it is important for the Court to consider a finding that Rogers' confession was made because he didn't know that his wife couldn't be used as a witness against him. Rogers confessed because he was fearful of what his wife might say against him. I think the inference there is obvious.

Paragraph F states it is undisputed that Mrs. Rogers attended the trial without assistance. Counsel says she was assisted by his wife or by his niece. Where is his niece to say that? Where are the doctors to say that? Where are the neighbors to say that? Has Rogers sustained his burden of proof to the degree required in a hearing such as this?

Paragraph 19. All that that is is that Sergeant Mulhern says Mrs. Rogers claims she had been sick. No date, no extent, no information at all as to the effect upon her.

In regard to paragraph 8, I say in reply that the underlying facts, that is as to whether Rogers asked for counsel, are exclusively within the trial courts, that where the Trial Court has found underlying facts and has made its conclusion of facts on that

basis, this Court should examine only the conclusion of fact unless there is some vital flaw in the procedure used.

Now on page 13 we have here a heading "Paragraphs which are not disputed as being untrue, but which are misleading without amplification.

Going to "B" on that page, paragraph 28 urges the Court to change its finding that he was for the first time warned of his rights at the Coroner's office because of Rogers' prior arrests, the fact that his brother was a police officer and it was thought Rogers was acquainted with the law in a general way. Assuming the truth of these allegations the petitioner says, they have no relevance to the finding attacked unless that finding is read "he was for the first time in his life warned of his rights." Now what difference can it possible make whether he had been warned two weeks before on January 10, the day before that on January 9, in 1949 at the time of his arrest? If he had been warned and warned repeatedly as we claim the evidence shows, it does not make any difference whether he was warned a minute before or two weeks before. So I say that that is one of the important considerations that the Supreme Court takes under advisement, whether this Accused had any previous experience, as to what his attitude was towards the police from prior arrests and from prior association. I say that it is essential to have such a finding that he had been warned of his rights on more than one occasion, four arrests and two interrogations at the last arrest or before January 30.

I have already discussed paragraph "c" and perhaps also paragraph "d." Counsel in paragraph d says "these paragraphs ignore any explanation of how Mrs. Rogers was in actuality to be summoned for information since the officer talked to no one." Surely he talked to no one the first time he called but he was reaching for the telephone the second time and there is no evidence that he was intending to call Mrs. Rogers and as I have said already, this investigation would not have been an investigation worthy of the name if they had failed to question Mrs. Rogers and they didn't fail to do so even though they didn't question her that night.

We do object to the words "gave in" because they don't take into account these other considerations that were pressing upon Rogers, causing him to conclude that it would be futile to persist in denials any longer and it would be to his advantage to go ahead and put on this crime the best possible face and by that best possible face I mean first the claim that he was drinking and secondly the claim that he had been taking Mrs. Kennedy to the hotel for a period of six months and on this particular night where he had been visiting with her for an hour and drinking with her and eating and claimed falsely claimed, claimed it in his confession but nowhere else, that then suddenly she abused him and provoked him and used profanity towards him with the result that he shot her, struck her first with the butt of the gun and then shot her five times.

I say these are elements for this Court to consider in determining whether it was this threat which the Court seems to have some doubt about because the Court says of such a threat as would be likely to cause a confession. It seems to me the Court must include in its findings these other factors which we claim are the real and true motivating force in this confession.

Paragraph "b" refers to our paragraph 27, the use of the words "pro forma." I submit, if your Honor please, to me there is a difference between the words "pro forma" and the words "stock warning." "Pro forma" to me seems to indicate that it was just a passing reference to it, that it didn't mean anything or it might not have meant anything to the witness to whom it was addressed, but we have Rogers' own testimony that he understood exactly what the Coroner was saying and he repeats it to your Honor here that the Coroner was telling him he didn't have to say a thing if he didn't want to and he could go ahead and have a lawyer in there at the hearing and doesn't the fact that he says, "I understand" and makes no claim for a lawyer induce some inference that he wasn't interested in a lawyer the day before?

We have produced four officers of the law stating that he did not make such a request and I can produce others besides those. Not one of them claims—every one of them claims that

he did not make a request for a lawyer and I don't think I need to argue here before your Honor that certainly the motive in falsifying by Rogers is far greater than any motive of these police officers.

In paragraph "c" I really don't object to the use of the word "intermittently." In my argument, however, although our paragraph does refer to "intermittently" my objection is to the word "prolonged." Even "intermittently" does not give the actual impression that there were actual interruptions and delays and pauses of some considerable time, but if the Court terms that intermittently, I would accept it and submit without any further question, but I do object to the "prolonged" because there is an inference that that was more or less continuous even with the word "intermittent" and I say that that should be modified to show the real and true facts.

We object to the use of the words "in relays" because there is an implication there and if your Honor looks at one or two cases—I am fearful to say just which one because I may misstate it—the use of the words "in relays" in that case or two cases implies that the officers had to quit in order to get some sleep. That was the case where there was forty-two hours of questioning in relays by the police and although the police had to stop for sleep, they didn't permit the Accused to stop to sleep and so of course the Court held that that was prolonged questioning in relays. And for the Court to use it here certainly—well it isn't a comparable situation by any means to those cases where the Supreme Court has ruled.

Paragraph "e" talks about our objections to the words "brought in" and "into custody." Again I want to refer your Honor to Rogers' own testimony at the trial. He didn't say anything about taking her into custody or placing her under arrest. The whole thing was placed on "brought in" for questioning. The principal objection seems to be that the confession resulted from this vague telephone call and not that it resulted from any pressure on Rogers because of the illness of his wife.

Paragraph "g" refers to several of our paragraphs and remember this heading under which I am discussing it in petitioner's brief are paragraphs which are not disputed as being untrue, but misleading without amplification.

With reference to 15(d), your Honor will note or paragraph "g" of petitioner's brief and refers to paragraph 15d which says Rogers responded to questions unhurriedly, deliberately and considerably. All that is not disputed, although we are entitled to have that in the finding. Counsel says it is not disputed. And Rogers himself says that the questioning did not confuse him.

Paragraph 17—if that is not disputed, if the police did not resort to persistent, relentless or continued questioning I feel that that too should be included.

The COURT. Mr. Ullman, you have skipped—you are referring to these last two matters as matters that are conceded except in another way but you omitted to note the paragraphs involved any characterizations.

Mr. ULLMAN. Where is that?

The COURT. The last two discussions.

Mr. ULLMAN. Notations of characterization. All right. Well I still claim that has the same effect, paragraphs involving connotations of characterizations. I certainly think that we are entitled to a finding that the police did not resort to persistent, relentless or continuous questioning of Rogers, particularly in view of the Court's finding that the questioning was intermittent.

And also paragraphs 32 and 33 we feel should definitely be included in a finding in the case that Rogers fully comprehended the statements of the Coroner that he did not have to say anything unless he wanted to and that he was entitled to a lawyer if he wanted one. And a finding too that since Rogers said that he understood the Coroner I believe that we are certainly entitled to a finding that Rogers fully understood his rights and actually made no request for a lawyer at the outset of the Coroner's questioning, an undisputed fact.

Paragraph "h." I don't know whether counsel is attempting to be facetious in the second statement there; he refers to the

fact that the questioining did not adversely affect Rogers, that it is an inaccurate conclusion insofar as it ignores the fact that the activity of the questioning periods resulted in a confession. The Courts are not interested in the adverse affect. They are interested in his will to respond, on his freedom of action, on his voluntariness, not on the adverse fact that the confession came about. And as far as that request for finding is concerned, Rogers acknowledged that he wasn't adversely affected, that the question did not confuse him.

And now we come to page 16, paragraphs which are contained in essentially the same form in the Court's Memorandum and/or the Contrary of which has never been claimed by relator.

Well the first of these is paragraph 14 asking that a finding be added that Mrs. Rogers had been interrogated by the police. We thing that that is essential. We think that it is important for any court to know whether she had been deleted from any previous questioning before, whether it would make a difference. It seems to me in the reaction of her husband and herself whether or not the police had ever interrogated her before is an important and significant finding.

15(b) contrary to which has never been claimed by Relator, that he sat in a comfortable chair, armchair, he was permitted to smoke, allowed to go to the men's room at his request and appeared to be relaxed. We feel we are entitled to have such a finding by this court.

15(o) after Captain Eagan stated his intention to question Mrs. Rogers, Rogers devoted a full hour to considering (1) whether he should confess and (2) what excuse or explanation to give in attempted mitigation of his crime. We feel that it is most essential the Court would be anxious and interested to know whether there were other motives besides this one which the Court states is not ordinarily likely to cause a confession of a capital crime so that if Rogers devoted that hour to considering whether to confess and what to say in his confession, that should be part of this finding.

It should also be found as I have heretofore stated, that the confession of Rogers took place at approximately 10:20 P. M. This is 15(p).

15(r) it should be found that Rogers confession is not merely a statement "I did it" but a thirty page confession, thirty page document, at the conclusion of which Rogers made oath to the truth before a notary public.

There should also be a statement, it seems to me, that there was no deprivation of food, rest or relief, which facts are undisputed in the finding, and which counsel here says he has never claimed anything to the contrary.

Those are things that the Supreme Court looks at as to the circumstances surrounding the accused at the time of the confession.

The next discussion is paragraph 24, that Rogers was not again questioned for seventeen hours later. We feel that that too should be in because without it there is some uncertainty in the finding—and that it took place at 5:00 o'clock in the afternoon if your Honor please. And that his confession was given under oath within a period of one and a half hours.

And then paragraph 29. We feel it is most essential that there be a finding here that prior to his questioning on January 30 Rogers had been placed under arrest on at least four other occasions in Connecticut and in New York.

As was said in the citation case, what would overcome the resistance of one person might not overcome the resistance of an experienced criminal who knew about the ways of detection and investigation of crime.

Paragraph 30 in that some connection, that Rogers had been subjected to questioning by police on the day following the murder when he reported his nephew's gun had been stolen by persons unknown and again on January 9 and again on January 10. In addition to these prior arrests and if that is nothing to the contrary his claim, the claim by the Relator, we feel that certainly should be included as part of the finding.

And also that Rogers was represented by counsel on the date of the grand jury hearing well in advance of the date of trial and at all times since.

Paragraphs which the petitioner discusses next are of inconsequential significance, irrelevant or are not findings.

The question of pro-forma I think we have already discussed and we certainly feel the warning given by the Coroner to the Accused should definitely be a part of the finding particularly since Rogers' claims that he understood it and particularly since it will shed light and have some significance in determining whether he did ask for counsel the day before.

Paragraph 42, we ask for a finding that Rogers' confession was a product of his considered and free choice because of his devoted full hour's consideration to it and then starting it off with the statement, "I was drinking."

We assert that he freely considered whether to confess and he freely considered what to say in his confession. It shows he was fully aware of the situation as well as of himself.

Paragraph 43, we ask in that that the Court examine the confessions themselves to determine just how much mental freedom Rogers exercised first in making his decision to confess, secondly, in making his claim of partial exoneration and third, the manner in which he actually had the confession transcribed. If it was a "yes" and "no" in answer to questions, "yes" and "no," that would be one thing, but if it went into a narrative form and if the questions were answered freely and readily without any thought as to what the questions meant or what his answers might signify, it seems to me that that is most important and it should be amended, particularly in view of the claim of the petitioner. Those claims certainly are not inconsequential.

Bottom of page 16 under "D," paragraphs of the affidavit concerning matters of law and the threat of summoning Rogers' wife. Counsel complains that I cite no authority to substantiate this statement. Well, your Honor has observed in my brief at least six cases wherein practically the identical situation was

presented and there were other factors in those cases. On pages 2, 3 and 4 of my brief I have cited there 1, 2, 3, 4, 5, 6, 7, 9 cases and I can't find any case to the contrary, if your Honor please. Counsel on the other hand who has the burden of establishing his claim before your Honor comes up and with one single case, *Herman* vs. *Claudy*, 350 U. S. 116 (1956) that is no authority for this claim, if your Honor please; that was a decision wherein it was held to be error summarily to dismiss a petition for habeas corpus without a hearing. That's all that case is authority for, but if you want to get into the facts of that case you will find that that man went to trial without a lawyer, without a lawyer—at least that was his claim—so he didn't have a lawyer at the trial. His claim was that there were seventy-two hours of questioning—seventy-two hours of questioning and his claim was, and this is how counsel comes in on this case, that the police threatened the safety of his wife, the safety of I's wife. Now I say that that case is not authority for counsel's position here and, on the other hand, we, who don't have the burden, have produced at least nine cases and we have produced another nine, I believe, to show the converse of that proposition, not only as a threat to bring in a wife for questioning or even to put her into custody, not such a threat as will vitiate a confession, but the promise of a benefit not to bring her in is universally held not to affect the admissibility of a confession. As against that, counsel has brought in one single case which, in my opinion, my own analysis, is far from being helpful to your Honor in deciding this issue.

Counsel refers also on page 17 to paragraphs 37 and 38 wherein we ask the Court amend its finding that there was considerable other evidence of Rogers' guilt of this crime. I think I have discussed that and your Honor will see this is an essential part of the finding in the case, in a case of this sort as to whether there was further evidence of guilt not for the purpose of determining whether his confession was proper, but for the purpose of determining whether there were other considerations that induced this confession, separate and apart from any remark of Captain Eagan's.

We feel, too, that there should be a finding added that Rogers didn't take the witness stand during his trial except as to the involuntariness of the first confession. He certainly didn't take it on the hearing on the second.

Counsel endeavors to state that "I am conceding that the Supreme Court or Errors implied an improper standard." I am not making any concesssion here. I am arguing here even assuming they did, this is not the vital or essential point here. The vital or essential point is what standard did the Trial Court apply? I think your Honor will find that amply illustrated in the record. The Supreme Court of Errors did state that the admissibility of confession in this State is the voluntariness of the confession and then cited *State* vs. *Palko*. I concede that there is other language there which may amount to or at least may cause confusion even though it is not a misstatenient of the law.

The record shows, the record which your Honor has before you shows the Trial Court followed the orthodox method. Petitioner here says that there is language in the charge to the jury to indicate that it, too, was applying a truth-falsity standard. That isn't so. Read his own language there on page 18. "The trial court told the jury, 'The rules which surround the use of a confession are designed and put into operation because of the desire expressed in law that the confession, if used, be probably a true confession.'" That isn't talking to admissibility. That is talking about what happens after it is determined to be admissible. That is the basis of the confession before the jury and that is for the jury to determine, whether it is a true confession. That reinforces our claim that the Court submitted this to the jury on the orthodox method without first finding independently that it was a voluntary confession.

That instruction to the jury merely is telling them to determine its truth, to ascertain the weight that they will give it and of course, to take into consideration the circumstances under which it was obtained.

Counsel also quotes me here on page 16 as talking about an untrue confession. Of course, if your Honor please, in the first

place this is taken out of context. We were talking about the trick, the fake telephone call and I expressed the statement of law that a trick which has no tendency to produce a confession except one in accordance with truth is still admissible. That is under the law of *State* against *Palko*. That is, that the officer used some deceit and it is generally a universal law that if deceit produces a confession, that confession is still a voluntary confession as long as the deceit isn't such as is aimed to produce an untrue confession.

So if your Honor please, if your Honor wants to see the position that I took your Honor has only to look at my brief re the Supreme Court of Errors on page 10 wherein I say that the Court properly allocated the functions with respect to the confession, reserving to itself the determination of whether the confession was voluntary and leaving to the jury the determination of the weight and credibility to be attached to it. That, as I say, is in my brief and I believe on page 10 of my brief and that is the position that I took.

And I say in that connection that *Brown* vs. *Allen* held that the Court may make its own determination of voluntariness but not the determination of underlying facts as long as there is no vital flaw in the system used by the trial court in determining the voluntariness of the confession.

Page 19, the question of totality of circumstances. I think your Honor will observe that we have quoted four or five cases wherein there are not only all of those four elements present, but many more where the courts have sustained the admissibility of a confession.

I do not think, if your Honor please, that I need to impress upon this Court the importance of this decision, not only to this case, but in future cases, the degree of proof required in order to overturn the confession and ruling of the state court. We, too, are interested in seeing that justice is done. We believe that justice was done in this case and that this confession was altogether voluntary. We feel that that has been established in the trial court of this state and been approved by other courts to which

this case has been referred. On the other hand, we feel that the petitioner by no means has sustained the burden of proof required of him in showing that this confession was involuntary and that his confession is invalid.

I understand that we may file a reply brief. Did your Honor indicate?

The COURT. If one week would be sufficient I would like to have it in a week from today.

Mr. ULLMAN. One week from today. I think perhaps that can be done.

The COURT. If you need more time I can set another time at this time, but if you think you can get it in within a week it will fit in with my shedule a little better. We won't be sitting a week from tomorrow and we have Veterans' Day coming up which gives us one more day.

Mr. ULLMAN. Very well.

Mr. ROBINSON. I just want to say one word.

Mr. ULLMAN. I may refer, if your Honor please, to my brief. May I? Page 10 of this brief. It refers to the proper allocation of functions.

Mr. ROBINSON. May I make just one remark? Most of it hinged on the claim that the burden of proof was on the Relator in referring to the Court many matters and therefore at this stage of the game in the opinion of Respondent's attorney, that burden not being maintained to his satisfaction, he now asks to have these changes made.

I believe I am sound in this, after the judgment has been entered the burden then shifts with equal weight to the mover, and not only must matters that could be received on the other basis be considerably more impressive than they otherwise would be, certainly the judgment, having been entered, the unusual action of the re-hashing of the whole thing and trying it over again requires a great deal of force to the arguments made by my friend, particularly in view of the fact that nothing has been said here. I have listened all during the day—nothing has been said here that couldn't have been said with the assistance of proper advice, if

that was necessary, on the day of the hearing. There was no element about the matter then; ample time was given so that the issues about to be presented would be clearly in the mind of counsel and all of these matters, both as to fact and law, could have been presented on the hearing itself. This is really an effort in large measure to treat this Court as a Court of appeal on its own decision, sitting on its own decision and with certain very minor exceptions in the over-all proof which I think again should wait until whether the motion is properly decided, should not entitle the respondents because if they're innocent—and I say that without charging my friend with perjury or anything of the kind, he certainly had the opportunity that any counsel had to present his side of the case and the fact that he is now assisted by one of my former public defenders, Mr. Zampano, as I have been assisted by the author of this article which he recites on the different rules. You will find that article is written by Mr. Zeldes and Mr. Zampano, a man of great ingenuity, appearing as the vanguard of the relentless State's Attorney.

We will file our brief if at all possible within a week.

Mr. ULLMAN. One other thing: May I leave with you these confessions? They should be part of the matters considered.

Mr. ROBINSON. I ask your Honor not to—

The COURT. I will hold them in the file and consider them after receiving your briefs as to whether I should go into them or not for any further evidence. I will so indicate.

Court will adjourn until tomorrow morning at 10:30.

PETITION FOR WRIT OF HABEAS CORPUS.

The petition of Harold D. Rogers respectfully shows:

1. That he is a citizen of the United States of America and the State of Connecticut.

2. That he is at present unjustly and unconstitutionally detained and imprisoned at the State Prison at Wethersfield, Connecticut, by the respondents by virtue of a judgment and death sentence pronounced upon him by the Superior Court in and for

the County of New Haven, on May 25, 1954, upon conviction of the crime of murder in the first degree in perpetration of a robbery.

3. The petitioner is presently detained by the respondents, George A. Cummings, Frederick G. Reincke, and Stuart T. Tillinghast, in the State Prison, awaiting the execution of death by electrocution, on September 10, 1956, which date was fixed by the Superior Court in and for the County of New Haven on June 14, 1956, after the exhaustion of State remedies. The petitioner avers that said imprisonment, restraint and sentence are illegal and void in that petitioner was denied effective representation by counsel and was convicted by the use of involuntary confessions, all in violation of due process of law as guaranteed by the Fourteenth Amendment of the Constitution. In order that this Court may fully appreciate the grounds for the instant petition, petitioner sets forth herein the circumstances which were in violation of petitioner's Constitutional rights under the Fourteenth Amendment so as to render the judgment of conviction null and void.

The facts are as follows:

Dorothy Kennedy, the proprietress of a liquor store at 193 Ocean Avenue in the Town of West Haven, County of New Haven, Connecticut, was shot and killed on November 21, 1953.

This killing was unsolved when petitioner was presented in the City Court of New Haven on January 13, 1954, charged with attempted robbery, breaking and entering, and theft committed on January 9, 1954, at the Travelers Hotel in New Haven. Through private counsel, petitioner waived examination and was bound over to the April session of the Superior Court and placed in the New Haven County Jail through a duly issued mittimus.

Shortly after 12:00 noon on January 30, 1954, by direction of a letter from the State's Attorney, Abraham S. Ullman, the petitioner, while still confined under the City Court mittimus, was illegally removed without court order from the County Jail and delivered to the office of the State's Attorney. This removal was

in violation of Connecticut General Statutes, Section 8727, which expressly provides that an accused be held in the county jail until the next criminal term of the Superior Court, or until he is discharged by due course of law. Both the majority and dissenting opinions of the Connecticut Supreme Court of Errors conceded the illegality of the removal. 143 Conn. 167, 174, 179, 181.

Upon arriving at the State's Attorney's office, petitioner was told for the first time he was to be questioned about the Kennedy murder. He was not warned of any of his rights and when he requested to consult with his lawyer, his request was not honored. Petitioner testified that he asked for counsel about an hour after his arrival at about 1 P. M. at the State's Attorney's office. This testimony was uncontradicted. Petitioner testified that two detectives were present when he requested counsel. Neither of these detectives were called by the State to testify. The police officer who did testify, Assistant Chief Eagan, by his own testimony (1) did not arrive at the State's Attorney's office until 8 P. M. and (2) did not testify about the period before he arrived.

Therefore, petitioner's testimony as to the happenings from about 1 P. M. to 8 P. M. was clearly uncontradicted in regard to his request for counsel. Petitioner does not rely on any testimony which was contradicted by Eagan as to the events after 8 P. M., but solely on the uncontradicted testimony which the State did not elect to challenge with the available detectives.

On review, the majority opinion of the Supreme Court of Errors did not accept or reject the trial court finding on the request for counsel, but considered, arguendo, that petitioner was denied counsel at the State's Attorney's office and the dissent stated conclusively, "Upon arriving there, he was told for the first time that he was to be questioned about the death of Mrs. Kennedy. He immediately asked to see his lawyer. Not only was this request refused but he was thereafter subjected to a prolonged interrogation from approximately 1 P. M. until the early morning hours of the following day."

From approximately 1 P. M. until 12 midnight on January 30, petitioner was subjected to prolonged police interrogation. Peti-

tioner, a Negro, had at least one hand hand-cuffed throughout the interrogation by police officers questioning in relays. Here again petitioner's testimony is uncontradicted as to events before 8 P. M. As to events after 8 P. M., Assistant Chief Eagan's testimony indicate that at least one wrist was in a handcuff at all times.

For approximately eight hours the petitioner persistently denied involvement in the killing of Mrs. Kennedy. Only after the assistant police chief threatened to have petitioner's wife, who was ill suffering from arthritis, taken into custody and his foster children turned over to juvenile authorities did petitioner implicate himself in the resulting alleged confession. The police officer admitted pretending to make two telephone calls for the purpose of impressing petitioner with the advisability of giving a statement that the interrogator was then requesting.

The relation between the faked calls and the confession is emphasized by the following testimony in the record:

"Q. (Cross-examination of Eagan). And he continued to deny any involvement in the case until after the fake telephone call with regard to his wife. Is that correct? A. Well, I say there was an hour's difference between the time I made the call and the time he started to talk.

"Q. That I understand, but that was after he— A. Oh, that is after, yes, after the call.

"Q. And after you had told him about these ballistic reports he still maintained his denial until after the call to Mrs. Rogers? Right? A. Yes." (Tr. p. 456.)

"Q. (Direct examination of Rogers). And what happened after Chief Eagan arrived? A. He said he was going to check my wife up and have her come down and have the two children and he picked up the telephone. I thought he was telephoning. He was talking to Headquarters. Said 'Get a squad car ready to pick up Mrs. Rogers and have the matron pick up the two children and take them some place and keep them over night. Well, bring her down there for questioning, keep her down there over

night if necessary.' . . . (Disputed testimony here omitted.)

"Q. Did he say anything about holding it up for an hour? A. Yes, he said he would give me an hour; indirectly. He didn't say exactly that, indirectly, he didn't exactly say. He told them over the phone to hold that car for an hour and he could call up and tell them directly when to send for her, gave me the impression he gave me an hour to confess.

"Q. Is that the reason you gave him this statement? A. That's right." (Tr. pp. 462, 463.)

"Q. (Cross-examination of Rogers). Did you use the whole hour to consider whether you were to confess? A. That's right.

"Q. You used the whole hour? A. That's right.

"Q. And at the end of that hour, after that hour's consideration, he went to the telephone, picked up the phone, and was it then that you made the confession? A. That's right.

"Q. And that was because of what he said to you about your wife? A. That's right.

"Q. Coming down? A. That's right." (Tr. p. 463.)

On the morning of January 31, after petitioner had been returned to jail, the New Haven County Coroner ordered the jailer by telephone to hold petitioner incommunicado and not to let him see his lawyer. The Coroner testified that "I left instructions that he wasn't to see anybody; that he was to be held incommunicado until I lifted that order." Shortly after this order, petitioner's privately-retained counsel demanded to consult petitioner, but the high sheriff of the county, after consulting with the State's Attorney, denied this request. Although counsel was denied admittance to see his client, police officers were allowed to interrogate petitioner again.

Later in the afternoon, petitioner was removed, without court order, to the Coroner's office where he made further incriminating statements. This removal was also in violation of Connecticut General Statutes Section 8727 since no court authorization was secured, and also Section 485 since the Coroner admittedly made no determination of an alternative, appropriate place of confinement. The majority and dissenting opinions in the court below considered the removal of petitioner to the Coroner's office

illegal, 143 Conn. 167, 173, 179, 181. These statements to the Coroner were made only twelve to fourteen hours after the petitioner made the alleged confession in the State's Attorney's office. The Coroner admitted that he was aware of the earlier confession when he ordered petitioner to be brought before him for interrogation.

Thereafter, on March 2, 1954, the Grand Jury for the County of New Haven returned an indictment, in two counts, for first degree murder. His personal funds exhausted, petitioner was, and has since been, represented by the Public Defender for New Haven County.

At the trial, the federal questions in regard to effective representation by counsel and use of involuntary confessions were first raised as objections to the ruling on the admissibility of the two alleged confessions. The trial court overruled petitioner's objections. The federal questions were again raised in a written request for a specific charge when the case was submitted to the jury, but this request was denied when the court charged the jury.

After the jury returned a verdict of guilty on May 19, 1954, petitioner appealed to the Supreme Court of Errors, where by assignment of error the federal questions were raised for the consideration of the Connecticut judiciary for the third time. The Supreme Court of Errors specifically rejected petitioner's claims, one judge dissenting, 143 Conn. 167, 173.

A petition was filed with the United States Supreme Court for a writ of certiorari to review the determination of the Supreme Court of Errors and was denied by that Court: 351 U. S. 952; (1956).

4. That the circumstances detailed in paragraph 3, above, clearly indicate that the conviction is in conflict with the due process standards of the Fourteenth Amendment. Petitioner maintains that:

I. The State Denied Effective Representation by Counsel.

A preponderance of the capital cases claiming deprivation of counsel decided by the Supreme Court have charged state authorities with failure to appoint counsel or with the acceptance of an ineffective waiver of the right to counsel. Petitioner at bar makes no such claim. Petitioner had privately-retained counsel of his own choosing in an unrelated charge of robbery. The denial of this right to counsel stems from the State's refusal to allow communication between petitioner and his attorney at two significant stages in the proceedings—at the time of and immediately preceding the time when petitioner allegedly confessed to a capital crime.

At the State's Attorney's office, petitioner unsuccessfully demanded to see his counsel prior to making an alleged confession. At the jail the next day, counsel was denied access to petitioner under an incommunicado order from the Coroner. The State made no claim that this requested consultation would in any way interfere with the reasonable operation of the jail. That fact that police officers were allowed to interrogate petitioner shortly after his own lawyer was denied admission indicates that the State's sole purpose was to prevent petitioner from receiving the advice of counsel until after he had been taken to the Coroner's inquest.

Either of these interferences, on two successive days, were denials of petitioner's right to consult his privately-retained counsel. For over two decades, since the now famous case of *Powell* vs. *Alabama*, 287 U. S. 45 (1932), the Supreme Court has firmly held that the Fourteenth Amendment guarantees the right of the accused in capital cases to the effective assistance of counsel in the preparation and trial of his case. In discussing the Constitutional contents of a fair hearing, Mr. Justice Sutherland asked, "What then does a hearing include?" and answered":

> ". . . Historically and in practice, in our own country at least, it has always included the right to aid of counsel when *desired* and *provided* by the party asserting the right . . . He requires the guiding hand of counsel *at every step in the proceedings* against him . . . If in any case, civil

> or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, *employed by* and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of hearing, and, therefore of due process in the constitutional sense . . ." (Emphasis added.) 287 U. S. 45 at 68, 69.

More recently, the Court has reemphasized the right to effective representation by counsel in the unanimous declaration in *Chandler* vs. *Fretag*, 348 U. S. 3 (1954):

> "Regardless of whether petitioner would have been entitled to appointment of counsel, his right to be heard from his own counsel was *unqualified* . . . . A necessary corrollary is that a defendant must be given a reasonable opportunity to employ and *consult* with counsel." (Emphasis added.) 348 U. S. 3 at 9, 10.

Petitioner at bar desired counsel. He had provided for his own counsel. Under the *Powell* and *Chandler* doctrines, his unqualified right to counsel was interfered with when he was twice denied an opportunity to consult with his own attorney.

Under the Supreme Court's general rule established in the *Powell* case, lower federal courts have detailed the Fourteenth Amendment's insistence on effective aid of counsel in state proceedings. It was held that the mere presence of a prosecution interpreter during an attorney-client consultation was an unconstitutional interference with the right to counsel in *Yung* vs. *Coleman*, 5 F. Supp. 702 (1934).

More recently, in *Application of Sullivan*, a federal court ruled that in capital cases the right to counsel is such a basic and fundamental right as to require its uniform availability to those accused of crime in both state and federal courts and that absence of counsel until after arraignment constituted denial of effective counsel. 126 F. Supp. 564, 570, 571 (1954).

The decisions of the Supreme Court support the ruling in the *Sullivan* case, where appointment was involved, that in capital cases, the right to counsel is such a basic and fundamental right

as to require its uniform availability in both state and federal courts. Although a majority of the Court has not subscribed to the doctrine that the Fourteenth Amendment embraces the items of the Bill of Rights, Supreme Court decisions indicate that when human life is in balance, fundamental principles of liberty and justice demand that state courts observe the same standards prescribed for the federal courts by the Sixth Amendment in regard to both appointment of counsel and acceptance of competent waiver. *Powell* vs. *Alabama, supra; Williams* vs. *Kaiser*, 323 U. S. 471 (1945); *Tomkins* vs. *Missouri*, 323 U. S. 485 (1945).

Under the *Powell* ruling, there is no doubt that an accused in a capital case is entitled to self-retained counsel and a reasonable opportunity to consult with him, *Powell* vs. *Alabama, supra*, at p. 69. Petitioner maintains that the right to consult—like the right to appointment and the right to be protected from incompetent waiver—is so basic and fundamental as to be uniformly available under both the Sixth and Fourteenth Amendments and that decisions by federal courts under the Sixth Amendment are relevant.

In *Coplon* vs. *U. S.*, 191 F. 2d 749 (1951), on a motion for a mistrial, the Court of Appeals for the District of Columbia held that if the government merely intercepted telephone communications between attorney and client either before or during the accused's trial there was unconstitutional activity on the part of the government. The court added:

> ". . . It would not be an answer to say the accused can not complain of the interception of his telephone conversations with his counsel *if he had on the other occasions ample personal consultation with his lawyer, face to face, which no person overheard. That fact would not erase the blot of unconstitutionality from the act of intercepting other consultations* . . ." (Emphasis added.) 191 F. 2d 749 at 759.

Under this ruling, the unconstitutional interference with petitioner's rights at the State's Attorney's office and at the jail—which prevented all consultation not merely deprived it of privacy—could not be erased by an explanation of his rights to peti-

tioner at either the Coroner's hearing or at the trial. The court in the *Coplon* case used, as authority, cases where both federal and state courts defined the right to counsel in state prosecutions to point out that it is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation.

In *Glasser* vs. *U. S.*, 315 U. S. 60 (1942), this court used the *Powell* doctrine to point out that ". . . we [are] clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." The Court added:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U. S. 60 at 76.

An array of state decisions have emphasized the sanctity of the right of the accused to consult with counsel. In *In Re Snyder*, 62 Cal. App. 697, 217 Pac. 777 (1923), it was held that where a heavy wire screen made passing of papers between attorney and client impossible and other persons could hear the conversations, there was a denial of the right to consult counsel.

Other state cases to the same effect, in regard to attorney-client consultation are *Ex parte Rider*, 50 Cal. App. 797, 195 P. 965 (1920), *People* vs. *Shiffman*, 350 Ill. 243, 182 N.E. 760 (1932), and cases cited in the *Coplon* case at page 758. Although these decisions are not binding on the case at bar, the Supreme Court used thirteen state court decisions as "support" in the *Powell* case:

> "Under the circumstances disclosed, we hold that the defendants were not accorded the right to counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. This conclusion finds *ample support* in the reasoning on an overwhelming array of state decisions, among which we cite the following: . . ." (Emphasis added.) *Powell* vs. *Alabama*, *supra*, at 58.

Even under the less stringent standards adopted by the Supreme Court in non-capital cases—whether under the circumstances the accused suffered fundamental injustice which was seriously prejudicial—petitioner has been denied the right to counsel. The standards applicable to non-capital cases are clear in *Townsend* vs. *Burke*, 334 U. S. 736 (1948), where the Court pointed out at page 739 that if the accused suffers a serious disadvantage without counsel, a violation of due process occurs. The circumstances of the case at bar emphasize that at the most critical period of the proceedings against petitioner—at and immediately prior to two interrogations during which two alleged confessions were exacted and at times when consultation was vitally important—petitioner was denied the aid of his own privately-retained counsel. The action of the State resulted in petitioner being without counsel from the very instant he knew he was a suspect until he had twice confessed to a crime for which the state seeks his life.

II. The Confessions Were Involuntary and Their Use Violated Due Process of Law.

The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment. *Leyra* vs. *Denno*, 347 U. S. 556, 558 (1954). Even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict, the conviction will be set aside. *Malinski* vs. *N. Y.*, 324 U. S. 401, 404 (1945). The Supreme Court's criterion in regard to involuntary confessions was enunciated in *Watts* vs. *Indiana*, 338 U. S. 49 (1949), where it was held:

> "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questiioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary yielding . . ." 338 U. S. 49 at 53.

"A determination of the circumstances, as shown by undisputed facts, indicates that neither confession in the case at bar was free from substantial police pressure so as to be the product of a free choice. At the State's Attorney's office, petitioner, a Negro, was interrogated, while illegally detained, for approximately twelve hours by police officials questioning in relays. Kept handcuffed, never informed of his rights and denied the right to consult counsel, the accused maintained his innocence until after the assistant police chief threatened to send for Rogers' sick wife. In *Haley* vs. *Ohio*, 332 U. S. 596 (1948), the Supreme Court held a confession procured after only five hours of interrogation where an uneducated Negro accused was without benefit of counsel and unwarned of his rights was not voluntary. Only the age of the accused in the *Haley* case made the circumstances there less in conformance with the dictates of due process, but the court pointed out:

> "... Neither *man* nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." (Emphasis added.) 332 U. S. 596 at 601.

In the case at bar, the undisputed facts indicate that the first confession came only after the police threatened to bring petitioner's sick wife into custody and deliver his foster children to welfare authorities. The interrogator's fake phone calls in regard to bringing the wife into custody were admittedly designed to elicit the requested statement. The concept of due process adopted by the Supreme Court voids a conviction procured on the basis of a confession induced by threats or promises. *Lisenba* vs. *California*, 314 U.S. 219, 237 (1941). That threats as to conduct to be employed against other persons can violate the due process of law guaranteed to the accused is clear from the recent case of *Herman* vs. *Claudy*, 350 U. S. 116 (1956) where it was held that threats to the accused's wife and children must be considered in determining if the accused is entitled to relief from a state court conviction.

Besides being procured after prolonged interrogation, threats to bring into custody petitioner's family, and a denial of counsel,

the first confession was made while the accused was in illegal custody. Of course, federal courts do not have the corrective power over state courts that they do over their own tribunals—as expressed in *McNabb* vs. *United States*, 318 U. S. 332 (1943). But the case at bar is dissimilar from *Gallegos* vs. *Nebraska*, 342 U. S. 55 (1951) where the confession was challenged on the sole basis of unlawful detention. Almost two decades ago this court emphasized that illegal custody is an element in the totality of circumstances comprising a denial of due process in the confession area:

> "From the popular hatred and abhorrance of *illegal confinement*, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there has been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." (Emphasis added.) *Chambers* vs. *Florida*, 309 U. S. 227 at 236, 237 (1940).

From the totality of circumstances—threats, denial of counsel prolonged interrogation, and illegal detention—surrounding the extraction of the confession at the State's Attorney's office, its use was a violation of the fundamental concepts of ordered liberty and justice required by due process of law.

When petitioner made the statements to the Coroner on January 31, he did so only after he had been denied communication with his counsel at the jail. This denial in itself was enough to make the resulting confession lacking in due process. But this second confession does not stand in isolation. The Coroner admitted the impetus for his interrogation was the knowledge of the prior confession. The second statement, also made while petitioner was illegally detained, came within twelve to fifteen hours of the first. From these circumstances, the challenged confessions are, in effect, but one. The confession to the Coroner must fall with the tainted confession made to police officers the day

before. As the Supreme Court pointed out recently in the *Leyra* case:

> "All were simply parts of one continuous process . . . We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution." *Leyra* vs. *Denno*, *supra*, at 561.

The Connecticut court, in sustaining the use of the two confessions challenged here, adopted a standard in patent conflict with the Supreme Court's criteria of due process in the confession area. It established as the test of involuntary confessions, ". . . whether, under these and other circumstances of the case, the conduct induced the defendant to confess *falsely* that he had committed the crime being investigated." (Emphasis added.) 143 Conn. 167, 173. The court relied on the truth-falsity test again at page 174 of the opinion where it said, "There is nothing about his illegal removal, however, to demonstrate that he was thereby forced to make an *untrue* statement" and ". . . here again, the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence *untrue* statement."

This truth-falsity standard adopted by the Connecticut court does not assure the accused the minimal protection of due process as demanded by the rulings of the Supreme Court. The Court has repeatedly held the use of involuntary confessions, despite the fact that there was sufficient independent evidence to insure the veracity of the statements contained therein, was a denial of due process. *Malinski* vs. *New York*, 324 U. S. 401, 402, 404 (1945); *Lyons* vs. *Oklahoma*, 322 U. S. 596, 597, n. 1 (1944); *Stroble* vs. *California*, 343 U. S. 181, 190 (1952). In the *Rochin* case, the test approved by the Connecticut court was unanimously rejected:

> ". . . Use of involuntary confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as *true*. Coerced confessions offend the community's sense of fair play and decency." (Em-

phasis added.) *Rochin* vs. *California*, 342 U. S. 165, 173 (1952).

Therefore, by the clear standards of the United States Supreme Court, the confessions were exacted under conditions which make their use in a capital case a deprivation of due process of law. Only through the application of a criterion in patent conflict with this court's rulings was their use sustained by the court below.

5. That, as aforesaid, petitioner has exhausted all of the State remedies, such exhaustion being a prerequisite for this action under 28 U.S. C. Sec. 2254, including a writ of certiorari to the United Sattes Supreme Court, and the petitioner is therefore remediless save in this Court and by this procedure. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, and, therefore, should be given no weight by a federal court in considering the merits of the same petitioner's application for writ of habeas corpus. (Opinion of Mr. Justice Frankfurter stating the position of a majority of the Court on this point in *Brown* vs. *Allen*, 344 U. S. 443, 489-97).

6. That no previous application has been made for the writ prayed for below.

Wherefore, the premises considered, the petitioner prays:

(1) That a writ of habeas corpus, directed to the said respondents, may issue in his behalf so that the petitioner may be brought forth before this Court;

(2) That said respondents be required to appear and answer the allegations of this petition.

(3) That following a full and complete hearing this Court relieve petitioner of said unconstitutional detention, imprisonment and sentence of death.

(4) That in event the appropriate authorities of the State of Connecticut shall refuse to stay the execution of petitioner pending determination of the instant petition before this Court, that respondents, George A. Cummings, Frederick G. Renicke and Stuart E. Tillinghast, and their agents, officers and or employees

be stayed from executing the judgment and death sentence imposed by the Superior Court in and for the County of New Haven, or from otherwise taking any action or proceedings against said petitioner pending final determination of the instant petition.

(5) And for such other, further and different relief as to this Court may seem just and proper under the circumstances.

HAROLD D. ROGERS, Petitioner.

THOMAS R. ROBINSON,
Public Defender for New Haven County.

THOMAS R. ROBINSON,
185 Church Street,
New Haven, Connecticut.

STATE OF CONNECTICUT } ss. Wethersfield,
COUNTY OF HARTFORD } August 22, 1956.

Harold D. Rogers, being duly sworn, deposes and says that he is the petitioner in the within action; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HAROLD D. ROGERS.

Sworn to before me this 22d day of August, 1956.

THOMAS R. ROBINSON.

[Filed Aug. 22, 1956, New Haven, Conn., Clerk, U. S. District.]

ORDER FOR WRIT OF HABEAS CORPUS.

Upon reading the verified complaint of Harold D. Rogers, and good cause appearing therefor,

It is ordered that a writ of Habeas Corpus issue out of this court directing the production of the body of said Harold D. Rogers before the Court on Friday, August 31, 1956, at 10:30 A. M.

Dated at Hartford, Connecticut, this 23rd day of August, 1956.

J. JOSEPH SMITH,
United States District Judge.

A true copy.

Attest:
GILBERT C. EARL,
Clerk, U. S. District Court,
By THOMAS A. GRIMES,
Deputy Clerk.

[SEAL]

WRIT OF HABEAS CORPUS.

The President of the United States of America to Frederick G. Reincke, Acting Warden, and or to whomsoever else may have custody and charge of the body of the above-named Rogers, Greeting:

You are hereby commanded, that the body of Harold D. Rogers by you restrained of his liberty, as it is said detained by whatsoever names the said Rogers may be detained, together with the day and cause of his being taken and detained, you have before the United States District Court in and for the District of Connecticut, at the courtroom of said Court, in the City of Hartford, at 10:30 A. M., on the 31st day of August, 1956, then and there to do, submit to and receive whatsoever the said Court shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable J. Joseph Smith, United States District Judge at Hartford, Connecticut, this 24th day of August, A. D. 1956.

G. C. EARL, Clerk,
By THOMAS A. GRIMES,
Deputy Clerk.

A true copy.

Attest:
GILBERT C. EARL,
Clerk, U. S. District Court,
By THOMAS A. GRIMES,
Deputy Clerk.

[SEAL]

RETURN TO WRIT OF HABEAS CORPUS.

In obedience to the writ of habeas corpus issued in the above entitled matter, I, Frederick G. Reincke, Acting Warden of the Connecticut State Prison, have the within named Harold D. Rogers before the United States District Court in and for the District of Connecticut and as to the day and cause of his detention I assign the mittimus issued by the Clerk of the Superior Court for New Haven Countty on June 14, 1956, a copy of which is attached hereto, and I do further certify and make return to said writ as follows:

1. Paragraph 1 of the Petition is admitted.

2. Paragraph 2 of the Petition is admitted, except for the allegation that the Petitioner is at present unjustly and unconstitutionally detained and imprisoned, which is denied.

3. So much of Paragraph 3 as alleges that Petitioner had in fact been represented by counsel on the date of the Grand Jury Indictment and at all times since, and that the precise points raised in this Petition have been previously presented by Petitioner at four successive stages of the proceedings and determined adversely to him by three Courts, is admitted and the remaining allegations of said Paragraph are denied.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

Wherefore, Respondent herein prays that the writ of habeas corpus be dismissed and the Petitioner remanded to custody.

FREDERICK G. REINCKE, Respondent.

To the Sheriff of New Haven County, His Deputy, and to the Warden of the Connecticut State Prison, and His Deputy Warden of Said Prison—Greeting:

Whereas at a Superior Court having criminal jurisdiction holden at New Haven, within and for the County of New Haven, on the first Tuesday of January, 1954, Harold D. Rogers of the

Town of New Haven, in said County of New Haven then confined in the New Haven County Jail, situated in the Town of New Haven, in said County of New Haven, was charged with the crime of Murder in the First Degree and upon an indictment of the Grand Jurors summoned from the body of said County of New Haven, charging the said Harold D. Rogers of the Town of New Haven in said County of New Haven, with the crime of Murder in the First Degree, wherein it was set forth as follows:

"STATE OF CONNECTICUT)
COUNTY OF NEW HAVEN) ss.

To the Honorable Superior Court, having criminal jurisdiction, holden at New Haven, within and for the County of New Haven, on the 1st Tuesday of January, A.D. 1954, and now in session:

First Count.

The Grand Jurors, within and for the County of New Haven, upon their oaths, accuse Harold D. Rogers, of the Town of New Haven, in said County; of the crime of Murder in the First Degree, and charge that at the Town of West Haven, in said County, on the 21st day of November, A. D. 1953, the said Harold D. Rogers did in perpetrating a Robbery murder one Dorothy Kennedy by shooting her, the said Dorothy Kennedy, all in violation of Section 8350 of the General Statutes of Connecticut as amended.

Second Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, further accuse the said Harold D. Rogers of the crime of Murder in the First Degree, and charge that at the Town of West Haven, in said County, on the 21st day of November, A. D. 1953, the said Harold D. Rogers did shoot the said Dorothy Kennedy, in consequence of which shooting the said Dorothy Kennedy did die on said 21st day of November, A. D. 1953, and said murder was done wilfully, deliberately and premeditatedly, all in violation of Section 8350 of the General Statutes of Connecticut as amended, which said indictment was returned into said Court on

the 2nd day of March, 1954, endorsed "A True Bill, Frank T. Healey, Foreman."

And whereas the Court (MELLITZ, J.) on May 25, 1954 entered the following judgment:

"State of Connecticut.

No. 9995.

STATE OF CONNECTICUT	}	Superior Court,
vs.	}	New Haven County,
HAROLD D. ROGERS, of New Haven.	}	May 25, 1954.

Present, HON. SAMUEL MELLITZ, Judge.

JUDGMENT.

Upon an indictment laid before the Grand Jurors of said New Haven County, duly impanelled and sworn by Abraham S. Ullman, Esquire, Attorney for the State within and for said County, charging said Harold D. Rogers, of the Town of New Haven, in said County, with the crimes of Murder in the First Degree in Perpetrating a Robbery and Murder in the First Degree, and returned to this Court (QUINLAN, J.) by the Grand Jurors on March 2, 1954, and endorsed a true bill as by said bill of indictment, as on file, will more fully appear, the prisoner appeared before this Court, at its September Term, 1953, Winter Session, thereof, on March 4, 1954, and for plea said not guilty to each count of said indictment, and elected to be tried by a Jury of 12 on each count, and thence to April 23, 1954 when the aforesaid Harold D. Rogers, by his counsel, filed a motion for a change of venue and a motion that the State be ordered to elect upon which count of said indictment the State would elect to proceed, and thence to April 28, 1954 when the Court denied the aforesaid motion for a change of venue and denied without prejudice the defendant's motion for an order of election as to counts, and thence to April 29, 1954 when the defendant, by his counsel, filed a motion for a change of venue, which motion the Court denied, and thence to May 18, 1954 when the defendant, by his

counsel, made oral motion that the State elect which count it would proceed on, and the State's Attorney orally, in open Court, *made election to proceed on the 1st count charging Murder in* the First Degree in Perpetrating a Robbery, only, and thence to May 19, 1954 when after a full hearing the case was committed to the Jury who returned a verdict of Guilty of Murder in the First Degree in Perpetrating a Robbery, at 5:05 P. M., which verdict the Court accepted and ordered recorded, and when the defendant, by his counsel, made oral motion that sentence of said prisoner be deferred, which motion the Court granted and remanded the prisoner to the custody of the Sheriff to be brought forth for sentence on May 25, 1954, and thence to May 20, 1954 when the prisoner, by his counsel, filed a motion to set aside said verdict at 10:01 A. M., and thence to the present time when the Court denied said motion.

Wherefore it is adjudged that the said Harold D. Rogers be remanded to the custody of the Sheriff of this County, to be conveyed by him or other proper authority, within the next twenty days to the Connecticut State Prison at Wethersfield and to be safely kept until the 22nd day of November, 1954, whereupon the punishment of death shall be inflicted upon the said prisoner, Harold D. Rogers, the execution of this sentence to be in accordance with the provisions of the statutes of this State, and that a warrant issue accordingly.

By the Court,

FRANK C. MINNIX

Assistant Clerk."

And whereas the Clerk of the said Superior Court for New Haven County at New Haven did issue on the 25th day of May, 1954, a mittimus directing the Sheriff of said New Haven County or his deputy within twenty days from said date to deliver the said Harold D. Rogers to the Warden of said Connecticut State Prison at said prison in the Town of Wethersfield in Hartford County and commanding the Warden of the Connecticut State Prison and in the event of his death, inability, or absence then the Deputy Warden of said prison, to receive and safely keep

the said Harold D. Rogers within said State Prison until the 22nd day of November, 1954, and that then and there on said 22nd day of November, 1954, *or within five days thereafter before* the hour of sunrise on said 22nd day of November, 1954, or within five days thereafter, within an enclosure lawfully prepared for that purpose and within the walls of said State Prison to electrocute and put to death him the said Harold D. Rogers unless he otherwise be discharged by due order of law.

And whereas Rocco P. Mara, a Deputy Sheriff of said New Haven County made written return on the 25th day of May, 1954, that by virtue of said mittimus he did deliver the within named Harold D. Rogers to the Warden of the Connecticut State Prison together with the original warrant.

And whereas the said Harold D. Rogers did on the 8th day of June, 1954, appeal from said judgment of the Superior Court for New Haven County held as aforesaid to the Supreme Court of Errors for the State of Connecticut.

And whereas on said June 8, 1954, the Clerk of the Superior Court for New Haven County at New Haven did give notice to the Warden and Deputy Warden of the State Prison at Wethersfield, Conn., that that appeal had been filed and tthat by virtue thereof the filing of said appeal automatically stays the execution of the death penalty imposed upon the said Harold D. Rogers and that said notice superceded the order issued to the said Warden and Deputy Warden in the mittimus issued by this Court in said action on said 25th day of May, 1954, and that said Warden and Deputy Warden were to keep safely the said Harold D. Rogers in said State Prison subject to further order and command of this Court.

And whereas the said Supreme Court of Errors for the State of Connecticut did on the 27th day of January, 1956, find and adjudge that there was no error in the proceedings of the said Superior Court for New Haven County aforesaid.

And whereas the said Harold D. Rogers did file in the Supreme Court of the United States a petition for a writ of certiorari to

the Supreme Court of Errors of the State of Connecticut in a case entitled *Harold D. Rogers, Petitioner* vs. *State of Connecticut* and docketed in said Supreme Court of the United States as No. 881 of the October Term, 1955.

And whereas the Supreme Court of the United States did on the 28th day of May, 1956, deny said petition for writ of certiorari.

And whereas on the 14th day of June, 1956, the said Harold D. Rogers was by writ of habeas corpus issued by this Court on June 7, 1956 produced and arraigned before said Superior Court for resentence, HON. RICHARD H. PHILLIPS, Judge, presiding.

And whereas said Court sentenced said Harold D. Rogers standing at the bar of said Superior Court as follows: "Harold D. Rogers, you have heretofore been convicted in this Court of the crime of Murder in the First Degree and sentence of death has heretofore been pronounced upon you. Thereafter your appeal to the Supreme Court of Errors of the State of Connecticut has been heard and the judgment of this Court has been affirmed, and your petition for a writ of certiorari to the Supreme Court of the United States has been denied. Pending your appeal and that petition the date originally set for the infliction of the death penalty upon you has expired. It now becomes the duty of this Court under the statutes of this State to fix a new date for the infliction of the death penalty. Accordingly this Court fixes the tenth day of September, 1956 as the date for the infliction of the death penalty upon you. You are hereby remanded to the custody of the Sheriff of this County to be conveyed by him or other proper authority to the State Prison at Wethersfield, where you shall thereafter be safely kept until the tenth day of September, 1956, whereupon the punishment of death shall be inflicted upon you; the execution of this sentence to be subject to and in accordance with the provisions of the Statutes of this State;" whereof execution remains to be done.

These are therefore by the authority of the State of Connecticut to command you, the Sheriff of said New Haven County, or your Deputy, that you, within twenty days from this date,

deliver the said Harold D. Rogers to the Warden of said Connecticut State Prison, at said prison, in the Town of Wethersfield, in Hartford County, and you the Warden of the Connecticut State Prison, and in case of your death, inability or absence, then you a Deputy Warden of said prison, are commanded to receive and safely keep the said Harold D. Rogers within said State Prison until the 10th day of September, 1956, and that then and there on said 10th day of September, 1956, or within five days thereafter within an inclosure lawfully prepared for that purpose and within the walls of said State Prison, and which inclosure shall be so constructed as to exclude public view, you shall electrocute and put to death the said Harold D. Rogers unless he be discharged by due order of law.

Hereof fail not but of this writ of execution due service and execution make according to law, and return make with your doings thereon.

By order of the Superior Court of the State of Connecticut, having criminal jurisdiction, at a Term held at New Haven, within and for the County of New Haven on the first Tuesday of June, 1956, on the 14th day of June, A. D., 1956.

In testimony whereof, I, Edward Horwitz, Clerk of said Superior Court for New Haven County, hereunto set my hand and affix the seal of said Superior Court, at New Haven, this fourteenth day of June, A. D. 1956.

(Signed) EDWARD HORWITZ,
Clerk of the Superior Court,
for New Haven County.

[SEAL]

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss. New Haven, June 14, 1956.

Then and there by virtue of this Original Warrant, I took, committed, and delivered the within named "Harold D. Rogers"

to the Warden of the Connecticut State Prison and left him this Original Warrant:

Attest:

ARTHUR C. RAFFILE,
Deputy Sheriff.

MEMORANDUM OF DECISION ON WRIT OF HABEAS CORPUS

Finding of Facts

Relator, Harold D. Rogers, a negro with an 8th grade education, presently 48 years old, seeks relief by writ of habeas corpus from a judgment and sentence of death by the Superior Court for New Haven County on a charge of murder in the first degree in the perpetration of a robbery. The judgment was affirmed on appeal, 143 Conn. 167, cert. den. 351 U. S. 952.

Rogers is the brother of a New Haven policeman. Rogers was arrested in New Haven January 9, 1954 charged with attempted robbery of The Travelers Hotel on that date. He retained counsel, and on January 13, 1954 waived examination in New Haven City Court and was bound over for trial to the Superior Court, April Term. While he was lodged in New Haven County Jail, on the morning of January 30, 1954, ballistic tests on a gun found in his possession at the time of his arrest determined that it had been used in the fatal shooting of Mrs. Kennedy in the holdup of a liquor store in West Haven on the evening of November 21, 1953. The gun had been stolen from his niece's house prior to the evening of November 21, 1953. On the order of the state's attorney he was removed from the jail without court order for questioning at the state's attorney's office. Until he confessed he was kept unavailable to his counsel. He claims that he was denied a request to see his counsel, which request the state's witnesses deny was made. That he made such a request seems most probable, and the Court finds that it was made. He was not warned of his right to say nothing or that what he said could be used against him. Questioned intermittently for some eight hours by the county detective, two New Haven and two West Haven police in relays, during which the gun was on the table before him, he stead-

fastly denied implication in the Kennedy shooting. He was handcuffed, but was allowed to smoke. He was given coffee and hamburg, one hand being released from the cuffs, which were then fastened to the chair arm, while he smoked and ate. He was taken to the men's room when he requested it. No physical violence or threats of physical violence were used. When the interrogators were unable to obtain any admission in the eight hour questioning Captain Fagan of the New Haven police was called in. After questioning for some time, Capt. Fagan threatened to bring in for questioning Rogers' wife if Rogers did not confess. He threatened to send the two foster children of the Rogers' who were estate wards, to an institution meanwhile. Mrs. Rogers suffered from arthritis, but was able to attend the trial. Fagan made a pretended telephone call on a dead wire to hold a car and officers in readiness to get Mrs. Rogers and the children. He then gave Rogers an hour to make up his mind whether to confess. At the end of that time he took the phone to pretend to order Mrs. Rogers and the children brought in. At this point Rogers gave in and made a confession completed at 1:00 A. M., 13 hours after the beginning of the questioning. He was then returned to the jail. The next morning, January 31, the coroner gave an oral order that Rogers be held incommunicado. His counsel called at the jail, but on orders of the state's attorney was denied access to him. Rogers was taken to the coroner's office where he was for the first time warned of his rights not to make a statement and to have counsel, but still fearing that the threat to take into custody his wife and children would be carried out if the original confession was repudiated, he repeated it for the coroner. One or two days thereafter the order that he be held incommunicado was rescinded. On his trial the confessions were admitted in evidence, the court finding on preliminary hearing in the absence of a jury that they were voluntary, and submitting to the jury the question of the weight to be given them, but refusing a requested instruction that the jury might disregard them in whole or in part if it found them involuntary. The confessions were the result of pressure overcoming Rogers' powers of resistence and were not voluntary on his part.

Discussion

The petitioner's state remedies are exhausted and his action will lie in this court. *Brown* vs. *Allen*, 344 U. S. 443. Denial of certiorari to the Supreme Court of Errors on the conviction in the criminal case does not preclude this action, for it is neither res judicata nor an opinion on the merits, if no opinion is given. *Brown* vs. *Allen*, supra, at 489-497; *Levra* vs. *Denno*, 347 U. S. 556.

Ordinarily, determination of disputed issues of fact by the trial judge and jury are binding upon the Supreme Court in direct review of a state conviction, where there is a dispute as to whether certain alleged coercive acts actually occurred, or where different inferences may be drawn from admitted facts. *Lyons* vs. *Oklahoma*, 322 U. S. 596, 602. On habeas corpus, the federal court must make its own determination of the underlying facts on the issues presented to it. While the criminal trial court's findings may be persuasive, they are not binding and this court has the ultimate duty of determining the underlying facts and inferences properly to be drawn from them. *Cramer* vs. *Gonzales*, 9 Cir., 226 F. 2d 83, 90, cert. den. 350 U. S. 935.

If the confessions were coerced, that is involuntary, it was a constitutional error to admit them into evidence on the question of Rogers' guilt. *Stein* vs. *New York*, 346 U. S. 156; *Levra* vs. *Denno*, supra; *Rochin* vs. *California*, 342 U. S. 165. The Supreme Court of Errors in this case appears to assume that admission of a coerced confession is not constitutional error unless the confession is shown to be untrue. This is not in accord with the federal constitutional rule which we must apply here. "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may independently established as true. Coerced confessions offend the community's sense of fair play and decency." *Rochin* vs. *California*, supra, at 173.

Denial of counsel in the preliminary proceedings is not in itself a fatal lack of due process, since defendant was represented by

competent counsel on trial and appeal. *Utah* vs. *Sullivan*, 10 Cir. 227 F. 2d 511, 513. Deliberate concealment of an accused from his counsel for prolonged questioning is, however, a circumstance which may affect the voluntary or involuntary character of the confessions, including the second confession which was made to the coroner while the order not to allow counsel to see him still held, even though the coroner then expressed willingness to allow defendant to see counsel. Nor is the illegality of the movement of defendant from the jail for questioning sufficient in itself to invalidate his later conviction. *Stein* vs. *New York*, *supra*. The coroner's action in holding a suspect in a homicide case incommunicado is probably illegal, having as its basis solely the statutory authority for segregation of witnesses during an investigation. Only in the rare case where particular counsel is himself a prospective witness could such denial of access to counsel be called segregation from other witnesses. This illegality would in itself have no effect on the suspect's volition unless he had some awareness of it. Here, however, the accused knew that the identity of his counsel was known to the prosecuting officials. In determining whether a confession has been psychologically coerced, the court must weigh the circumstances of pressure against the power of resistance of the person confessing. *Cramer* vs. *Gonzales*, supra, at 88. Rogers gave in to a threat which in itself, separated from the surrounding circumstances, might not be likely to cause a confession to a capital crime. It was applied, however, after more than eight hours of questioning, at a place removed from the jail, by which time it must have been obvious to Rogers that the counsel he had engaged was not to be allowed to see him and advise him on the new charge of a capital offense. That charge was first made known to him after his removal from the jail that day. The state's treatment of Rogers as a chattel of the investigators (see dissenting opinion of O'SULLIVAN, J., 143 Conn. 167, 181) moved around regardless of law and denied access to counsel must have had a coercive effect. We may give it weight in conjunction with other facts even if we do not hold illegal treatment in itself necessarily productive in every case of a coerced confession violative of due process. When Rogers

gave in to the threat to bring in his wife and children it must be held under all the circumstances here that he lacked sufficient mental freedom to make his confession voluntary. Its use in the trial to convict him is not consonant with the requirements of due process. The second confession the next day while still held incommunicado, although pro forma at least advised of a right to counsel, is also of doubtful admissibility. In any case, since the first coerced confession was admitted in evidence, and it cannot be said from the record what weight was given it, the judgment of conviction is invalid. *Stein* vs. *New York*, 346 U. S. 156, 191-192; *Cramer* vs. *Gonzales*, *supra*, at 90.

Rogers may be a thoroughly depraved individual, but his execution on a conviction based on confessions obtained under the circumstances outlined in this case may well establish a precedent endangering innocent men in the future. Constitutional safeguards would be weakened by a finding that confessions so obtained may be considered voluntary and in accord with present concepts of due process of law.

On the writ of habeas corpus heretofore issued, the judgment of conviction may be set aside. If appeal from the judgment herein is taken, relator may be held in the custody of respondents pending decision on appeal. If appeal is not taken relator may be held for retrial within a reasonable time of the charges against him. Form of judgment in accordance herewith may be submitted promptly by counsel for relator.

Dated at Hartford, Connecticut, this 19th day of September, 1956.

J. JOSEPH SMITH,
United States District Judge.

JUDGMENT

Upon considering all the matters presented to the Court in the above entitled Habeas Corpus proceeding, the Court found in its "Memorandum of Decision on Writ of Habeas Corpus" under date of September 19, 1956, that relator was denied due process of law and that the judgment of conviction was therefore null and void. The Finding of Facts and Discussion in said Memorandum of Decision on Writ of Habeas Corpus are hereby incorporated in this judgment.

Accordingly, it is ordered, adjudged, and decreed that the Writ of Habeas Corpus herein be and the same hereby is sustained and that judgment be and hereby is entered for relator on the merits, and it is further

Ordered, adjudged, and decreed that the judgment of conviction and the death sentence imposed upon relator by the Superior Court in and for the County of New Haven in the State of Connecticut is hereby vacated, and it is further

Ordered, adjudged, and decreed that relator Harold D. Rogers be discharged from custody of respondent unless relator is granted a new trial within 60 days after date of this judgment, or within 60 days after receipt by the Clerk of this Court of a mandate of the Court of Appeals and/or of the Supreme Court of the United States affirming this judgment if appeal is taken from this judgement.

Dated at Hartford, Connecticut, this 2nd day of October, 1956.

/s/ GILBERT C. EARL, Clerk.

Approved. Hartford 10/1/56.

/s/ J. JOSEPH SMITH,
U. S. D. J.

A true copy, Attest:

GILBERT C. EARL,
Clerk, U. S. District Court, Conn.

[Filed Oct. 2, 1956, New Haven, Conn. Clerk, U. S. District Court.]

MOTION TO AMEND AND SUPPLEMENT FINDINGS AND FOR REHEARING

Now comes Respondents and respectfully move the Court to amend and supplement its findings and for a rehearing, on the basis of the facts and claims alleged in the affidavit, attached hereto.

Dated October 11, 1956.

Respondents,
by ABRAHAM S. ULLMAN,
Their Attorney.

The subscriber hereto, Abraham S. Ullman, Attorney for the Respondents, being duly sworn, deposes and says.

1. That he is the State's Attorney for New Haven County representing the State of Connecticut in the investigation and trial of felonies committed within said County, and he believes that the decision rendered in the above entitled matter will have a serious limiting effect upon the extent of interrogation of suspected criminals, upon the type and scope of matters that may be inquired into, upon the confrontation of a suspect with potential witnesses against him, upon the area wherein a statement made by a police officer in the course of questioning a suspect is to be construed as a "threat," and upon confessions of a criminal in the absence of counsel.

2. In view of the far reaching effect of this decision upon the investigation and prosecution of crimes in the State of Connecticut, as well as the immediate result of awarding Rogers a new trial after he had been accorded a full trial in the courts of this State, and after the voluntariness of his confession had been passed upon and sustained at three successive stages of the proceedings and after certiorari was denied by the Supreme Court of the United States upon the identical issues of due process herein presented, the subscriber respectfully requests certain amendments and additions to the Court's finding of facts and a rehearing with respect to the matters hereinafter stated.

3. Such amendments and rehearing seem all the more imperative for the reason that this Court has predicated its decision upon the following considerations:

(a) Removal of Rogers from the jail to the State's Attorney's office without Court order, of which lack Rogers was altogether unaware and which accordingly had no causal relation to the confession, and which in any event this Court recognizes is not sufficient in itself to invalidate his later confession and does not in itself constitute a denial of due process.

(b) Denial of counsel during the police interrogation, which is a disputed fact found by the Connecticut Trial Court to be without basis and which in any event this Court recognizes does not in itself constitute a denial of due process.

(c) "Prolonged" questioning by the police, which is a disputed fact found by the Connecticut Trial Court to be without basis and which in any event falls far short of limits heretofore found unobjectionable by the Supreme Court of the United States.

(d) The remark of Captain Eagan with reference to sending for Rogers' wife for questioning, which is not inherently a threat and which this Court recognizes "might not be likely to cause a confession to a capital crime."

4. The subscriber requests that the Court amend its finding that "the gun had been stolen from his niece's house prior to the evening of November 21, 1953," to read that the gun had been stolen by Rogers from his niece's house on the very day of the murder, which fact is undisputed.

5. The subscriber requests that the Court amend its finding that "the interrogators were unable to obtain any admission" before Captain Eagan's arrival, to read that "Rogers, prior to his confession on January 30, 1954, had admitted to police that he had stolen the murder gun from his niece's home shortly before the Kennedy murder and prior to Captain Eagan's arrival he admitted that he knew the decedent and the location of her store, which facts are undisputed.

6. The subscriber requests that the Court amend its findings that refer to "eight hour" questioning to read "six hours," because the facts are undisputed that Rogers arrived at the State's Attorney's office at about 1 P. M., was not questioned during the first hour, and Captain Eagan arrived at 8 P. M.

7. The subscriber requests that the Court amend its findings characterizing the questioning as "intermittently" and "prolonged," since the undisputed evidence proves that there were frequent interruptions and recesses in the interrogation for the serving of food, coffee breaks, smoking, going to the men's room, telephone calls and checking by police officers; a full hour's consideration by Rogers whether to confess, and a further period awaiting the arrival of the Court Reporter.

8. The subscriber requests that the Court amend its finding by adding a finding that there were two full hours during which Rogers was not questioned at all; one hour directly after his arrival at the State's Attorney's office and another directly preceding his confession, which fact is undisputed.

9. The subscriber requests that the Court amend its finding with respect to the statement that Rogers made a confession completed "13 hours after the beginning of the questioning," on the ground that the evidence is abundant that questioning began about 2 P. M., that he orally confessed at approximately 10:30 P. M. to Captain Eagan, and that the court stenographer came in at approximately 11 P. M. in order to transcribe a written statement and the confession was completed at 12:30 P. M., ten and one-half hours after the start of questioning.

10. The subscriber requests that the Court amend its finding that Rogers was interrogated "in relays" by police, because the phrase carries the implication that the interrogators of a certain given period became exhausted from the strenuous type of questioning and had to be "relieved," which fact and inference are without support in the evidence presented to the Court.

11. The subscriber requests that the Court amend its finding by striking the finding that "until he confessed he was kept un-

available to his counsel," on the ground that no counsel was attempting to see him at that time which fact is undisputed and the Trial Court has found that Rogers made no request to see counsel.

12. The subscriber requests that the Court amend its finding that "at the end of that time he took the phone to pretend to order Mrs. Rogers and the children brought in," on the ground that there is no evidence that Captain Eagan stated that Mrs. Rogers' foster children were to be "brought in"; but rather, the evidence is clear that they were to be "cared for" by proper persons while Mrs. Rogers was to be questioned by police as to her knowledge of the subject matter.

13. The subscriber requests that the Court amend its finding that Rogers feared "his wife and children" were to be taken "into custody," because there is no evidence, nor does the defense claim, that Rogers' wife and her wards were to be taken "into custody" by the police.

14. The subscriber requests that the Court amend its finding by adding a finding that prior to January 30th Mrs. Rogers had been interrogated by the police, which fact is undisputed.

15. Because the Court found that Rogers' "powers of resistance" were overcome to the extent that he gave an involuntary confession, the subscriber requests that the Court amend and supplement its finding to present in detail the circumstances surrounding the confession:

(a) Rogers was brought to the State's Attorney's office from the jail at approximately 1 o'clock P. M. for questioning concerning the Kennedy murder after the police learned that the gun found in his possession at the time of his arrest for robbery was the murder weapon.

(b) He sat in a comfortable armchair throughout the interrogation, was permitted to smoke and allowed to go to the men's room at his request and appeared to be relaxed.

(c) He was not questioned at all between 1 P. M. and 2 P. M.

(d) Rogers responded to questions unhurriedly, deliberately and considerately.

(e) That Rogers acknowledges that the questioning did not in fact confuse him nor adversely affect him.

(f) At 4 P. M. he had a hamburg sandwich and a cup of coffee.

(g) At no time did the prisoner request more food.

(h) At approximately 8 P. M. Captain Eagan started to question the accused.

(i) At no time did Rogers request to see Mr. Robinson or Mr. Corse, nor did Mr. Robinson or Mr. Corse attempt to see him during that day.

(j) Captain Eagan told him that he was going to bring Mrs. Rogers down for questioning since she might have some knowledge concerning the subject matter, and that Mrs. Rogers' foster children would in the meantime be taken care of at the Children's Building.

(k) Captain Eagan never promised Rogers that if Rogers confessed his wife would not be questioned.

(l) The taking of the confession itself was recessed when a police officer brought in coffee to all those present, including Rogers.

(m) None of the interrogators had any knowledge that Mrs. Rogers had an arthritic condition.

(n) Aside from Rogers' present claim, there is no proof that Mrs. Rogers had an arthritic condition nor is there any evidence of the seriousness or extent of such alleged condition.

(o) After Captain Eagan stated his intention to question Mrs. Rogers, Rogers devoted a full hour to considering (1) whether he should confess and (2) what excuse or explanation to give in attempted mitigation of his crime.

(p) Rogers confessed orally at approximately 10:20 P. M.

(q) An official court stenographer came in at approximately 11 P. M. to take a transcript of the confession.

(r) Rogers' confession was a thirty-page statement, at the conclusion of which Rogers made oath to the truth before a Notary Public.

16. The subscriber requests that the Court amend its finding by adding a finding to the effect that in the interrogation of Rogers there was no deprivation of food, rest or relief, which facts are undisputed.

17. The subscriber requests that the Court amend its finding by adding a finding that the police did not resort to persistent relentless or continuous questioning of Rogers.

18. The subscriber requests that the Court amend its finding that "Mrs Rogers suffered from arthritis, but was able to attend the trial," on the ground that this finding implies that on the day of the confession Mrs. Rogers was unable to move about but that at the time of the trial she surmounted all her difficulties and her "suffering" to appear, which statement has no basis in fact; and further, allow additional evidence to show that Mrs. Rogers during the months of January, February and March left her home readily and frequently, of which facts the subscriber now has proof, which evidence is newly discovered since the hearing of this cause; and subscriber submits that the finding as made is without the degree of proof required of the Relator.

19. In view of the fact that the Court has accepted Rogers' bare assertion that his wife "suffered from arthritis" without proof of such condition or of its extent, subscriber requests that he be allowed the opportunity to introduce further evidence as to the actual physical condition of Mrs. Rogers at that time. That the relator did not introduce one iota of corroborative evidence as to his wife's alleged illness appears to the subscriber to constitute a definite failure on his part to sustain the burden of proof required in a habeas corpus hearing, especially since such prooof was altogether within his power to produce.

20. The subscriber requests that the Court amend its finding by adding a finding that Mrs. Rogers attended every session of the protracted murder trial without assistance and without apparent difficulty and also entered the witness box without assistance which facts are undisputed.

21. The subscriber requests that the Court amend its finding that "at this point Rogers gave in," on the ground that the expression "gave in" implies that Rogers was at a mental breaking point just prior to his confession, which fact has no basis in the evidence, and the thirty-page confession itself demonstrates that Rogers gave responsive answers, freely and informatively. Furthermore, Captain Eagan's testimony remains uncontroverted that Rogers answered "freely" and "without hesitancy at all," and that it was not necessary to repeat questions before Rogers gave his answer.

22. The subscriber requests that the Court amend its finding by adding a finding that Rogers was altogether unaware of the fact that he had been brought to the State's Attorney's office without a court order, which fact is undisputed.

23. The subscriber requests that the Court amend its finding that the police handled Rogers as a "chattel," and respectfully requests that the Court strike said characterization from its findings.

24. The subscriber requests that the Court amend its finding by adding a finding that following the conclusion of Rogers' confession to the police on January 30th, he was not again questioned until he was presented before the Coroner some seventeen hours later, which fact is undisputed.

25. The subscriber requests that the Court amend its finding by adding a finding that Rogers was presented before the Coroner at 5 o'clock P. M. the following afternoon, at which time his entire confession was given under oath within a period of one and one-half hours.

26. The subscriber requests that the Court's finding that Rogers repeated his confession to the Coroner "still fearing that

the threat to take into custody his wife and children would be carried out" be stricken on the grounds that there is no evidence that Rogers' wife and her wards were to be taken "into custod"; that since the confession to the Coroner was given at 5 o'clock in the afternoon, it is highly unlikely that Rogers allegedly feared their inconvenience; and because, at the hearing on the admissibility of his confession to the Coroner in the Connecticut Trial Court, no claim whatsoever was made that Rogers had any fear of this alleged threat at that time, and because of this claim coming by surprise, subscriber requests an opportunity to introduce the record of proceedings on this point.

27. The subscriber requests that the Court amend its finding that Rogers was advised "pro forma" of his rights and that the Coroner "expressed willingness" that Rogers see counsel, on the ground that the Coroner carefully advised Rogers at length of his rights and used such terms as "wish," "choose," "entitled to," etc., and that at the conclusion of the warning, the accused responded: "I understand." Furthermore, as set forth in the Coroner's statement, Rogers was aware of his rights, as is more fully set forth in the following paragraph.

28. The subscriber requests that the Court amend its finding that at the Coroner's office Rogers "was for the first time warned of his rights," which finding is without evidence. Rogers was the brother of a police officer and it is undisputed that Rogers had been arrested before, and there is nothing to indicate that he had not previously been advised of his rights in this respect so that the Coroner's statement, "I think you are acquainted with that law in a general way," was well founded in fact, to which Rogers made the affirmative response, "I understand."

29. Subscriber requests that the Court amend its finding by adding a finding that prior to his questioning on January 30th, Rogers had been placed under arrest on at least three other occasions in Connecticut and in New York, which fact is undisputed.

30. The subscriber requests that the Court amend its finding by adding a finding that Rogers had been subjected to questioning by the police on the day following the murder, when he

reported that his nephew's gun had been stolen by persons unknown, and on January 9th and January 10th following his arrest for robbery at the Travelers Hotel, as well as on the occasions of his prior arrests by New York and Connecticut police, which facts are undisputed.

31. The subscriber requests that the Court supplement its finding by adding the complete text of the Coroner's preliminary statement together with Rogers response.

32. The subscriber requests that the Court supplement its finding by adding a finding that Rogers fully comprehended the statements of the Coroner that he did not have to say anything unless he wanted to and that he was entitled to a lawyer if he wanted one, which facts are undisputed.

33. The subscriber requests that the Court supplement its finding by adding a finding that Rogers fully understanding his rights, made no request for a lawyer at the outset of the Coroner's questioning, which fact is undisputed.

34. The subscriber requests that the Court supplement its finding by adding a finding that the questioning of Rogers by the Coroner did not adversely affect him, which fact is undisputed.

35. Assuming without admitting, that the first confession was an involuntary one, the subscriber respectfully requests an opportunity to argue the law on the admissibility and effect of the confession to the Coroner in the light of the facts and circumstances surrounding such confession, and requests that the Court amend its finding with respect to the second confession by a finding that said confession was given voluntarily and its use at the trial does not constitute a denial of due process.

36. The subscriber respectfully requests that the Court reconsider its finding on a rehearing that it "seems most probable" that Rogers requested to see counsel, on the ground that the Connecticut judiciary expressly found to be contrary and that the Relator did not sustain his burden of the proof on this point to the degree required in this Court. The subscriber wishes, also, to

resubmit his offer of proof as to this crucial fact, especially in the light of the Court's use of the word "probable"

37. The subscriber requests that the Court amend its finding by adding a finding that aside from the confessions, there was considerable other evidence of Rogers' guilt of this crime.

38. The subscriber requests that the Court supplement its finding by adding a finding that Rogers did not take the stand as a witness during his trial, except as a witness on the preliminary inquiry as to the voluntariness of the first confession, which fact is undisputed.

39. The subscriber requests that the Court amend its finding by adding a finding that Rogers was represented by counsel on the date of the Grand Jury indictment and at all times since, which fact is undisputed.

40. The subscriber requests that the Court amend its findings and conclusions that the statement of Captain Eagan to bring Mrs. Rogers in for questioning constituted a "threat," on the grounds that such holding is contrary to the overwhelming weight of authority and case law on the point; and that a detailed presentation, step by step, item by item, of the facts and circumstances surrounding Captain Eagan's statement demonstrates that Captain Eagan and the other police officers were properly acting within the scope of their official duties in solving a most serious and vicious crime.

41. The subscriber requests that the Court amend its finding by adding a finding that, under the circumstances of this case, the police officers were justified in stating that they intended to question Mrs. Rogers; that in the usual and ordinary course of investigation, the wife of a suspected murderer would be questioned by police; that a mere statement to the suspect by the police that they intended to question his wife does not constitute a threat resulting in a violation of due process because if the act of questioning itself would not be illegal, the mere statement of an intention to do the act should not be construed to be illegal.

42. The subscriber requests that the Court amend its finding by adding a finding that Rogers' confession was the product of his considered and free choice, because of his devoting a full hour's consideration to it and then commencing his confession by stating, "I was drinking that time," illustrating his freely considered plan to try to gain some measure of exoneration.

43. In view of the Court's finding that Rogers' power of resistence was overcome and that he lacked sufficient mental freedom to make his confession voluntary, your subscriber requests that the Court examine the confessions themselves which reveal that Rogers, in an effort to mitigate his guilt, freely chose to invent out of whole cloth (1) an elaborate detailed story of an illicit sex relationship between the decedent and himself covering the six months preceding the murder and (2) a claim of provocation for the murder falsely based upon abusive and profane remarks directed by the decedent to him, thereby demonstrating that the confession was not the product of an abject, submissive recreant but rather the result of his own free choice.

44. In view of the fact that the Court recognizes that the so-called threat was such as "might not be likely to cause a confession to a capital crime," subscriber requests an opportunity to prove that Rogers' confession was motivated not by the "threat" or by concern for his wife but by his own self-interest; that Rogers realizing that the murder weapon, definitely shown to be in his hands on the night of the murder, substantially established his guilt, used the one hour's time afforded to him by Captain Fagan to concoct an excuse for the murder that might gain him some measure of exoneration.

45. The subscriber requests that the Court strike its finding that Rogers gave in to a threat, because Rogers expressly acknowledges that despite the threat he would not have made the statement had he known that his wife could not be used as a witness against him; or in the alternative the subscriber requests that the Court supplement its finding by adding a finding that Rogers gave in to the threat because he feared that his wife could be used as a witness against him.

46. The subscriber requests that the Court supplement its finding by adding a finding that Rogers was motivated into making his statement because of his belief that his wife could be used as a witness against him, which fact is undisputed.

47. The subscriber requests that the Court supplement its finding by adding a finding that Rogers was motivated into making his confession because he feared that his wife as a witness against him could give incriminating information to the police.

48. The subscriber requests that the Court amend its finding by adding a finding that the identical due process questions raised in this proceeding have been previously presented by the Relator at three successive stages of the proceedings and determined adversely to him in the courts of Connecticut, and were also presented on petition for certiorari to the Supreme Court of the United States which denied certiorari.

49. That in view of the Court's statement in its decision that "the Supreme Court of Errors in this case appears to assume that admission of a coerced confession is not constitutional error unless the confession is shown to be untrue," the subscriber requests the opportunity to insert into evidence the full and complete record, including Rogers' written confession and the Trial Court's detailed Finding on its admissibility upon which the Supreme Court of Errors ruled as it did, because it is apparent that the decision of the Supreme Court of Errors is to be considered and reviewed. Further, the subscriber desires the opportunity to re-argue the law as stated by the Connecticut judiciary in the light of the facts of the complete record that it had before it which establishes that the test of admissibility applied by the Trial Court was the voluntariness of the confession and that the truthfulness or untruthfulness of the confession was expressly left to the jury. This point the subscriber deems particularly crucial, especially in view of the Court's statement that the Trial Court refused "a requested instruction that the jury might disregard them in whole or in part if it found them involuntary," because an inspection of the complete instructions to the jury will demonstrate that the Trial Court expressly and correctly charged

the jury in conformity with the settled law in Connecticut, to wit: that it is the function of the Trial Court in the absence of the jury to determine, in the first instance, whether the confession is voluntary, and then submit to the jury the question as to its truthfulness and the weight thereby to be accorded to it.

50. Assuming that the Supreme Court of Errors in its decision misstated the Connecticut test of admissibility, subscriber deems it essential to place before this Court the detailed finding of the Trial Court on the admissibility of these confessions to establish that the Trial Court applied the proper constitutional test of voluntariness in determining their admissibility.

51. Subscriber requests an opportunity to argue the law bearing upon the point that this Court should base its decision herein upon the test of admissibility as actually applied by the Trial Court rather than upon any ambiguity contained in the decision of the Supreme Court of Errors, since if the test applied by the Trial Court was in accord with the Federal constitutional rule, the Connecticut Court's ambiguous statement of the test of admissibility may properly be disregarded by this Court.

Wherefore, your subscriber respectfully requests that the Court allow his motion to amend and supplement findings and for rehearing.

ABRAHAM S. ULLMAN.

MEMORANDUM OF DECISION ON MOTION TO AMEND FINDINGS AND MOTION FOR REHEARING

The motion may not have been timely filed, under the ruling of the Court of Appeals in the Schaefer case *(The F. & M. Schaefer Brewing Co. v. U. S.*, 2 Cir., Sept. 12, 1956), since more than 10 days had run from the entry on the docket reflecting the decision of the main issues in the case, which was promptly communicated to counsel by the Clerk. However, the question of what was a reasonable time for state action pending relator's release under the order of this court was not settled until the entry of the formal judgment. Although the question is not free from doubt, we will

take the latter as the date of entry of judgment and will consider the motion on the merits.

Since the entry of the memorandum was made known promptly to counsel, no authority exists to extend the time for appeal because of excusable neglect due to failure to learn of the entry. The United States is, however, a party, even if only a formal one, so that it would appear that time for appeal has not yet expired, even if the motion was not timely filed so as to toll the running of time to appeal.

On the merits, the motion for rehearing must be denied. While some of the requested changes or additions to the findings are justifiable in themselves, they are not sufficient to support a finding on the main issue, the involuntary character of the first confession, at variance with the finding entered. Nor is there sufficient allegation of new evidence which by due diligence could not have been presented at the orignal hearing to justify a new trial or rehearing. The following additions to the findings may be made on the evidence already presented, by way of amplification.

Additional Findings

(1) Rogers arrived at the State's Attorney's office about 1:00 P. M. He was kept sitting handcuffed, without conversation while officers passed in and out for about one hour before questions began.

(2) His oral confession to Captain Eagan began about 10:30 P. M.

(3) The written confession which followed was some 30 pages, sworn to before a notary public, when completed about 1:00 A. M.

(4) Rogers was represented by counsel on the day of the Grand Jury indictment and at all times since.

(5) Rogers had been arrested four times prior to the questioning on January 30, the first time in connection with a New York offense some 25 years before, and an arrest for violation of the

New York Reformatory parole, the third for a liquor offense in 1949 in New Haven, the fourth the arrest January 9 for The Travelers Hotel charge.

(6) Rogers did not take the stand during his trial, except as a witness on the preliminary hearing on the voluntariness of the first confession.

(7) There was other evidence than the confessions connecting Rogers with the crime, notably the ballistics evidence and the possession of the murder weapon.

The motion for rehearing is denied.

Except as indicated above, the motion to amend the findings is denied.

Dated at Hartford, Connecticut, this 14th day of November, 1956.

J. JOSEPH SMITH,
United States District Judge.

CERTIFICATE OF PROBABLE CAUSE

I, J. Joseph Smith, Judge in the above entitled cause, hereby certify that there exists probable cause for an appeal by the substitute respondent here in above named.

Witness my hand and seal as such judge this 16th day of November, 1956.

J. JOSEPH SMITH,
U. S. District Judge, District of Connecticut.

[Filed Nov. 16, 1956, New Haven, Conn. Clerk, U. S. District Court.]

NOTICE OF APPEAL

Notice is hereby given that Mark S. Richmond, Substitute Respondent, above named, hereby appeals to the Court of Appeals for the Second Circuit from the decision rendered in this action on September 20, 1956, from the judgment entered in this action on October 2, 1956, and the Order of Honorable J. Joseph Smith, United States District Judge, denying the above named respondent's Motion To Amend and Supplement Findings, and For Rehearing entered in this action on November 14, 1956.

Dated at New Haven this 16th day of November, 1956.

ABRAHAM S. ULLMAN,
Attorney for Respondent.

[Filed Nov. 16, 1956, New Haven, Conn. Clerk, U. S. District Court.]

MOTION TO SETTLE RECORD ON APPEAL

Now comes respondent and respectfully moves the Court that the following documents submitted to the Court during the hearing in the above entitled matter be marked as exhibits or otherwise be included in the record on appeal:

1. Interrogation of Harold D. Rogers conducted by Coroner James J. Corrigan, dated January 31, 1954.

2. Interrogation of Harold D. Rogers by Assistant Police Chief Raymond J. Eagan, dated January 30, 1954.

3. Record on appeal, Supreme Court of Errors, State of Connecicut, *State of Connecticut* vs. *Harold D. Rogers*, November Term 1954.

4. Brief of State of Connecticut-Appellee, Supreme Court of Errors, November Term 1954.

Dated at New Haven, Connecticut, this 20th day of December, 1956.

ABRAHAM S. ULLMAN,
Attorney for Respondent.

PETITIONER'S EXHIBIT E

May 14, 1954.

(Jurors and alternates seated at 10:10 A. M.)

Raymond J. Eagan.

(Resumed.)

Direct Examination (Continued) by Mr. Ullman.

Mr. ULLMAN. Continuing, if your honor please, at the top of page 14.

(Reads.)

Q. May I ask you, Chief Eagan, did you have some pictures there? A. There were some pictures.

Q. And were they shown to the accused? A. Yes, sir.

Q. Or did you let him look at some pictures? A. Yes.

Mr. ULLMAN. All right. (Reading continued.) There is a note here that a brief recess was taken at this time. Was there a recess taken?

The WITNESS. Yes.

Mr. ULLMAN. (Continues reading.) You may inquire.

Cross-examination by Mr. Corse.

Q. Chief Eagan, I think you told us that you got to the State's Attorney's office that night shortly after eight o'clock? A. About eight o'clock, yes, sir.

Q. To your knowledge Rogers had been there for some considerable time prior to that, under interrogation by other police officers, hadn't he? A. From what I was led to believe, yes. I wasn't there.

Q. And you talked to him until sometime after ten before this statement was actually written down, is that correct? A. Yes, sir.

Q. Something over two hours? A. A little over two hours.

Q. And I think you told Mr. Ullman that you had some con-

versation with him with regard to his wife, during that time, is that correct? A. I did.

Q. What was that conversation? A. Well, in talking to Rogers, I told him I thought I had better get his wife down and talk to her. He wanted to know why. I said for the reason that you have been arrested now since early in January. Now this gun develops as having been in your possession, used in the crime, the possibility that you may have told your wife about it on visits to the jail, and for that reason I might have to bring her down.

Q. Did you say anything about the children of Mr. and Mrs. Rogers? A. I did.

Q. What did you say about them? A. I told him that if his wife was brought down and the children were small, that he would need to get someone to take care of them, that probably would have to be—they probably would have to be put somewhere—where they could be taken care of for the night.

Q. Did Rogers tell you that his wife was sick at that time? A. He did not; no.

Q. He didn't tell you she was suffering from arthritis? A. No, he did not.

Q. Did you take any steps looking towards bringing Mrs. Rogers down? A. No, sir.

Q. Did you do anything to indicate to Rogers that you were taking such steps? A. I did.

Q. What did you do? A. I made a telephone call on the dead wire, and carried on a conversation, with such conversation, arranging to have officers and the police woman await my call if it became necessary to get Mrs. Rogers down.

Q. And that was on a dead line, you say? A. That was on a dead line.

Q. And it was a fake telephone call? A. It was.

Q. Prior to the time you made this fake telephone call indicating that you were going to have Mrs. Rogers brought down, had Rogers given you any statement? A. No, sir.

Q. To your knowledge, had he given anyone else a statement? A. No, sir.

Q. And this statement that he gave was given to you, then, only after that fake call had been made? A. About an hour later.

Q. Now, was the time of an hour mentioned in the course of the talk—the fake telephone call? A. I—in talking, I said to hold it up for a while and I'll call you back. I didn't say any length of time.

Q. Just prior to the time that he first made the statement to you, did you make some move with reference to the phone? A. I did.

Q. What did you do? A. I said, "I guess I'll have to bring your wife down after all" and I turned to the desk to pick up the phone, and that's the time I asked him if he was going to talk, and he said, just as I reached for it, he said, "I was drinking that time," so I just dropped the call and went back to the conversation and heard what he was talking about. Then he started to talk—

Q. So that it was immediately after you picked up the phone—A. I didn't pick it up. I reached toward the desk to do it.

Q. Made a motion indicating that you were going to pick it up? A. That's right.

Q. And told him that you were going to have his wife brought down here, down—if he didn't give a statement? A. That's right.

Q. Did you ask him at any time, then, if he were represented by counsel? A. I did not.

Q. You knew that he was, didn't you? A. I did not.

Q. Did he ask you or anyone in your presence for permission to call his counsel? A. He did not.

Q. Did he, to your knowledge, ask anyone else? A. Not to my knowledge.

Q. If he did, would you have called counsel?

Mr. ULLMAN. I object to that.

The COURT. Sustain the objection.

Mr. CORSE. Have an exception; exception.

The COURT. Exception may be noted.

Q. Were you aware of any instructions from anyone that he was not to be permitted to see counsel? A. I was not.

Q. Did you give any such instructions yourself? A. Did I give any such instructions?

Q. Yes. A. No, sir.

Q. As a matter of fact, you knew that he was held under such circumstances that it was impossible for him to see counsel, didn't you?

Mr. ULLMAN. Object to this, if the Court please. There is no requirement that—

The COURT. Sustain the objection.

Mr. ULLMAN. —the accused be allowed to see counsel.

Mr. CORSE. Have an exception?

The COURT. Exception may be noted.

Q. Did you warn him that anything he said to you might be used against him?

Mr. ULLMAN. Object to that. There is no requirement that—

The COURT. There may be no requirement, but whether he did, I think it is proper to answer that.

The WITNESS. I told Rogers—

Q. Just answer the question yes or no.

Mr. ULLMAN. I submit, if your honor please, that it may not be capable of such an answer.

The COURT. You answer it the way you think you ought to answer it.

The WITNESS. I told Rogers, in talking to him about this case, about the gun being in his possession and being used in a crime in another matter, what he told me would not be any benefit to him so far as I am concerned, because I had no power to draft any charge; that whatever he did, one way or the other, he had to stand before a jury or before a court of judges.

Q. Did you testify yesterday afternoon in this court room, in the absence of the jury? A. Yes, sir.

Q. Do you remember being asked this question by me, "Did you tell him that he didn't have to say anything." "Question: Did you tell him that anything he said would be used against him?" A. Well, that's what I said, what I told you yesterday.

Q. Do you remember me asking you that? A. I don't remember the question. I remember telling you just what I did yesterday. Refresh me on it. I will be happy.

Mr. CORSE. Referring, Mr. Ullman, to page 455 of the transcript. I will ask you to read the question aloud, please, Officer.

The WITNESS. "Question: Did you tell him that anything he said would be used against him" and the answer, "I did not."

Q. Did you give that answer? A. There is the answer here I gave.

Q. Is that answer true? A. That is true.

Q. Did you tell him that he didn't have to say anything to you? A. I did not.

Q. When did you first tell him that you had received ballistic identification on this gun? A. Early in my conversation with him.

Q. He didn't give you the statement at that time, did he? A. He denied it. He gave no statement at that time, no, sir.

Q. When you were talking to Rogers about the possibility of bringing his wife down, did you tell him he would be less than a man if he permitted her to be brought down? A. In talking to Rogers—

Q. Can you answer the question yes or no, Officer? A. Not the way you put it.

Q. You cannot answer it yes or not? A. Yes.

Q. You don't remember whether you told him he would be less than half a man if he permitted his wife to be brought down? A. I did tell him that.

Q. You did tell him that? A. I did tell him that.

Q. When did you tell him that? A. Oh, in the early part of the questioning.

Q. Was it before or after the fake telephone call? A. Before.

Q. So that you had had some discussion about bringing his wife down before you made the fake telephone call? A. That is all tied in with the one thing.

Q. You arrived there at eight o'clock or shortly after? A. About that time, yes, sir.

Q. Why did you come then? A. In response to a telephone call.

Q. From whom? A. Sergeant Mulhern.

Q. And was there some special reason for you coming then? A. To interroga. Rogers.

Q. Sergeant Mulhern is a very capable officer, isn't he? A. He is.

Q. He felt he needed your assistance? A. Not he alone.

Q. Someone else? A. Captain Wilson, Lieutenant Harvey wanted me to come down.

Q. They hadn't been able to get anywhere with Rogers? A. Apparently not.

Q. Now, was it soon after you arrived and had talked to him about bringing his wife down and made a fake telephone call and the beginnings of another telephone call, that he gave the statement? A. That is correct.

Mr. CORSE. That is all.

Mr. ULLMAN. I think that is all, Chief. Thank you.

Mr. Corrigan?

PETITIONER'S EXHIBIT F

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. . . . .

HAROLD D. ROGERS,
Petitioner

vs.

STATE OF CONNECTICUT,
Respondent

Petition for a Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut

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Petitioner, Harold D. Rogers, respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Errors of the State of Connecticut, affirming the judgment upon which the death sentence was imposed by the Superior Court for New Haven County.

OPINIONS BELOW.

The opinion of the Supreme Court of Errors of Connecticut and the dissenting opinion of Judge O'Sullivan, printed in Appendix A hereto, infra, pp. 17-28, are reported at 143 Conn. 167. The unofficial citation is 120 A. 2d 409.

Jurisdiction

The judgment of the Supreme Court of Errors of Connecticut was entered on January 27, 1956. A copy of the opinion was released February 7, 1956.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1257(3). Petitioner was deprived of rights under the Fourteenth Amendment to the Constitution of the United States of America by the decision of the Supreme Court of Errors of Connecticut affirming the judgment of conviction and the death sentence of the Superior Court of New Haven County.

Questions Presented

1. Did the State authorities in denying petitioner's request to consult his privately-retained counsel prior to making an alleged confession of a capital crime in the State's Attorney's office deprive petitioner of his right to the effective aid of counsel guaranteed in capital cases by the due process clause of the Fourteenth Amendment?

2. Did the State authorities in holding the petitioner incommunicado in jail the following day and prior to a second alleged confession of a capital crime deprive petitioner of his constitutional right to representation by counsel?

3. Were the undisputed circumstances of two unlawful removals from the county jail, prolonged interrogation, threats to confine petitioner's family, and denial of counsel, which surrounded the exaction of the two alleged confessions, such as to make them involuntary so that judgment inflicting the death sentence deprived petitioner of due process of law in violation of the Fourteenth Amendment?

Constitutional Provisions Involved

Petitioner relies on the Fourteenth Amendment to the Constitution of the United States under which he claims the judgment and sentence of death affirmed by the court below will deprive him of life without due process of law.

Statutory Provisions Involved

Connecticut General Statutes, Section 8727 and 485 (1949 Revision) upon which petitioner relies to demonstrate his illegal retention while the two alleged confessions were exacted, are set forth in Appendix E, infra p. 72.

Statement of the Case

Dorothy Kennedy, the proprietress of a liquor store at 193 Ocean Avenue in Town of West Haven, County of New Haven, Connecticut, was shot and killed on November 21, 1953.

This killing was unsolved when petitioner was presented in the City Court of New Haven on January 13, 1954, charged with attempted robbery, breaking and entering, and theft committed on January 9, 1954, at the Travelers Hotel in New Haven. Through private counsel, petitioner waived examination and was bound over to the April session of the Superior Court and placed in the New Haven County Jail through a duly issued mittimus (Record p. 39).

Shortly after 12:00 noon on January 30, 1954, by direction of a letter from the State's Attorney Abraham S. Ullman (Appendix D, infra, p. 70) the petitioner, while still confined under the City Court mittimus, was illegally removed without court order from the County Jail and delivered to the office of the State's Attorney. This removal was in violation of Connecticut General Statutes, Section 8778 (Appendix E, infra, p. 72-73), which expressly provides that an accused be held in the county jail until the next criminal term of the Superior Court, or until he is discharged by due course of law. Both the majority and dissenting opinions of the Connecticut Supreme Court of Errors conceded the illegality of the removal. 143 Conn. 167, 174, 179, 181 (Appendix A, infra, pp. 21, 26, 27). Upon arriving at the State's Attorney's office, petitioner was told for the first time he was to be questioned about the Kennedy murder. He was not warned of any of his rights (Appendix B, infra, p. 37), and when he requested to consult with his lawyer (Appendix B, infra, pp. 41, 45), his request was not honored. Rogers testified

he asked for counsel about an hour after his [illegible]al. This testimony was uncontested by the police officers who were present at the time of this request. (Record p. 34.)

From approximately 1 P. M. until 12 midnight on January 30, petitioner was subjected to prolonged police interrogation. (Record pp. 40, 41.) Petitioner, a Negro, had at least one hand hand-cuffed throughout the interrogation by police officers questioning in relays (Appendix B, infra, p. 42) and most of the time both hands were so chained (Appendix B, infra, p. 44). For approximately eight hours the petitioner persistently denied involvement in the killing of Mrs. Kennedy (Record p. 40). Only after the assistant police chief threatened to have petitioner's wife, who was ill suffering from arthritis, taken into custody and his foster children turned over to juvenile authorities (Appendix B, infra, p. 42) (Record pp. 40, 41), did petitioner implicate himself in the resulting alleged confession. The police officer admitted pretending to make two telephone calls for the purpose of impressing petitioner with the advisability of giving a statement that the interrogator was then requesting. (Appendix B, infra, p. 34.)

On the morning of January 31, after petitioner had been returned to jail, the New Haven County Coroner ordered the jailer by telephone to hold petitioner incommunicado and not to let him see his lawyer. (Appendix B, infra, p. 56.) The Coroner testified that "I left instructions that he wasn't to see anybody; that he was to be held incommunicado until I lifted that order." Shortly after this order, petitioner's privately-retained counsel demanded to consult petitioner, but the high sheriff of the county, after consulting with the State's Attorney, denied this request. (Record p. 35.) Although counsel was denied admittance to see his client, police officers were allowed to interrogate petitioner again. Later in the afternoon, petitioner was removed, without court order, to the Coroner's office where he made further incriminating statements. This removal was also in violation of Connecticut General Statutes Section 8727 since no court authorization was secured, and also Section 485 (Appendix E, infra, p. 72) since the Coroner admittedly made no determination of

an alternative, appropriate place of confinement. (Appendix B, infra, pp. 59-60). The majority and dissenting opinions in the court below considered the removal of petitioner to the Coroner's office illegal. 143 Conn. 167, 173, 179, 191. (Appendix A, infra, pp. 21, 26, 27.) These statements to the Coroner were made only twelve to fourteen hours after the petitioner made the alleged confession in the State's Attorney's office. The Coroner admitted that he was aware of the earlier confession when he ordered petitioner to be brought before him for interrogation. (Appendix B, infra, p. 51.)

Thereafter, on March 2, 1954, the Grand Jury for the County of New Haven returned an indictment, in two counts, for first degree murder. His personal funds exhausted, petitioner was, and has since been, represented by the Public Defender for New Haven County. Petitioner entered a plea of not guilty to both counts, but later at the trial on petitioner's motion, the State's Attorney elected to proceed on only the first count, charging murder in the first degree in perpetration of a robbery—a capital offense.

At the trial, the federal questions in regard to effective representation by counsel and use of involuntary confessions were first raised as objections to the ruling on the admissability of the two alleged confessions (Record pp. 27, 28, 32). The trial court overruled petitioner's objections (Record pp. 31, 35). The federal questions were again raised in a written request for a specific charge when the case was submitted to the jury (Record pp. 14-15), but this request was denied when the court charged the jury. (Record p. 15.)

After the jury returned a verdict of guilty on May 19, 1954 (Record p. 7), petitioner appealed to the Supreme Court of Errors, where by assignment of error the federal questions were raised for the consideration of the Connecticut judiciary for the third time. (Brief of Defendant-Appellant, pp. 17, 18, 22, 23, incorporated in certified record.) The Supreme Court of Errors specifically rejected petitioner's claims, one judge dissenting. 143 Conn. 167, 173 (Appendix A, infra, p. 21). In upholding the

conviction and rejecting petitioner's claim, the court below decided the questions presented on the basis of whether the State's conduct induced petitioner to "confess falsely." 143 Conn. 167, 173 (Appendix A, infra, p. 21). It is to this affirmation of the judgment imposing the death sentence that this petition for certiorari is directed.

Reasons for Granting the Writ of Certiorari

1. In refusing petitioner's request to consult his own previously-retained counsel while at the State's Attorney's office and in holding him incommunicado at the County Jail the next day, the State interfered with petitioner's right to an effective representation by counsel. This interference prevented consultation with counsel prior to the exaction of two alleged confessions of a capital crime. Whether petitioner's right to representation by his privately-retained counsel is measured by the same standards imposed as if he were protected by the Sixth Amendment in a federal court or by the tenets of fundamental fairness embodied in the concepts of due process of law, the interference by the state authorities deprived petitioner of rights guaranteed by the Fourteenth Amendment.

2. The use of the two alleged confessions—exacted under undisputed circumstances showing a denial of consultations with counsel, two unlawful retentions, prolonged interrogation by police officers questioning in relays, and a threat to bring into custody petitioner's sick wife and foster children—was also a denial of due process of law.

3. The Connecticut Supreme Court of Errors has sustained the admissability of the confessions here challenged through application of a criterion—whether the State's conduct produced untruthful confessions which is in patent conflict with the criterion of voluntariness prescribed by this court.

4. In upholding petitioner's conviction of a capital crime, the court below has ruled contrary to the applicable decision of this court.

Argument I: The State Denied Effective Representation By Counsel

A preponderance of the capital cases claiming deprivation of counsel decided by this court have charged state authorities with failure to appoint counsel or with the acceptance of an ineffective waiver of the right to counsel. Petitioner at bar makes no such claim. Petitioner had privately-retained counsel of his own chosing in an unrelated charge of robbery. The denial of his right to counsel stems from the State's refusal to allow communication between petitioner and his attorney at two significant stages in the proceedings—at the time of and immediately preceding the time when petitioner allegedly confessed to a capital crime.

At the State's Attorney's office, petitioner unsuccessfully demanded to see his counsel prior to making an alleged confession. At the jail the next day, counsel was denied access to petitioner under an incommunicado order from the Coroner. The State made no claim that this requested consultation would in anyway interfere with the reasonable operation of the jail. The fact that police officers were allowed to interrogate petitioner shortly after his own lawyer was denied admission indicates that the State's sole purpose was to prevent petitioner from receiving the advice of counsel until after he had been taken to the Coroner's inquest. Either of these interferences, on two successive days, were denials of petitioner's right to consult his privately-retained counsel. For over two decades, since the now famous case of *Powell* v. *Alabama*, 287 U. S. 45 (1932), this court has firmly held that the Fourteenth Amendment guarantees the right of the accused in capital cases to the effective assistance of counsel in the preparation and trial of his case. In discussing the Constitutional contents of a fair hearing, Mr. Justice Sutherland asked, "What then does a hearing include?" and answered

> ". . . Historically and in practice, in our own country at least, it has always included the right to aid of counsel when *desired* and *provided* by the party asserting the right . . . He requires the guiding hand of counsel *at every step in the proceedings* against him . . . If in any case,

civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, *employed by* and appearing for him, it reasonably may not be doubted that such a refusal would be denial of hearing, and, therefore of due process in the constitutional sense. . . . ." (Emphasis added.) 287 U. S. 45 at 68, 69.

More recently, this court has reemphasized the right to effective representation by counsel in the unanimous declaration in *Chandler* v. *Fretag*, 348 U. S. 3 (1954):

"Regardless of whether petitioner would have been entitled to appointment of counsel, his right to be heard from his own counsel was *unqualified* . . . . . A necessary corrollary is that a defendant must be given a reasonable opportunity to employ and *consult* with counsel." (Emphasis added.) 348 U. S. 3 at 9, 10.

Petitioner at bar *desired* counsel. He had *provided* for his own counsel. Under the *Powell* and *Chandler* doctrines, his unqualified right to counsel was interfered with when he was twice denied an opportunity to consult with his own attorney.

Under this court's general rule established in the *Powell* case, lower federal courts have detailed the Fourteenth Amendment's insistence on effective aid of counsel in state proceedings. It was held that the mere presence of a prosecution interpreter during an attorney-client consultation was an unconstitutional interference with the right to counsel in *Yung* v. *Coleman*, 5 F. Supp. 702 (1934). More recently, in *Application of Sullivan*, a federal court ruled that in capital cases the right to counsel is such a basic and fundamental right as to require its uniform availability to those accused of crime in both state and federal courts and that absence of counsel until after arraignment constituted denial of effective counsel. 126 F. Supp. 564, 571 (1954).

The decisions of this court support the ruling in the *Sullivan* case, where appointment was involved, that in capital cases, the right to counsel is such a basic and fundamental right as to require its uniform availability in both state and federal courts. Although

a majority of this court has not subscribed to the doctrine that the Fourteenth Amendment embraces the items of the Bill of Rights, this court's decisions indicate that when human life is in balance, fundamental principles of liberty and justice demand that state courts observe the same standards prescribed for the federal courts by the Sixth Amendment in regard to both appointment of counsel and acceptance of competent waiver. *Powell* v. *Alabama*, supra. *Williams* v. *Kaiser*, 323 U. S. 471 (1945); *Tompkins* v. *Missouri*, 323 U. S. 485 (1945). Under the *Powell* ruling, there is no doubt that an accused in a capital case is entitled to self-retained counsel and a reasonable opportunity to consult with him. *Powell* v. *Alabama*, supra, at p. 69. Petitioner maintains that the right to consult—like the right to appointment and the right to be protected from incompetent waiver—is so basic and fundamental as to be uniformly available under both the Sixth and Fourteenth Amendments and that decisions by federal courts under the Sixth Amendment are relevant.

In *Coplon* v. *U. S.*, 191 F. 2d 749 (1951), on a motion for a mistrial, the Court of Appeals for the District of Columbia held that if the government merely intercepted telephone communications between attorney and client either before or during the accused's trial there was unconstitutional activity on the part of the government. The court added:

> ". . . It would not be an answer to say the accused can not complain of the interception of his telephone conversations with his counsel *if he had on other ocasions ample personal consultation with his lawyer, face to face, which no person overheard. That fact would not erase the blot of unconstitutionality from the act of intercepting other consultations* . . ." (Emphasis added.) 191 F. 2d 749 at 759.

Under this ruling, the unconstitutional interference with petitioner's rights at the State's Attorney's office and at the jail—which prevented all consultation not merely deprived it of privacy—could not be erased by an explanation of his rights to petitioner at either the Coroner's hearing or at the trial. The court

in the *Coplon* case used, as authority, cases where both federal and state courts, defined the right to counsel in state prosecutions to point out that it is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation.

In *Glasser* v. *U. S.*, 315 U. S. 60 (1942), this court used the *Powell* doctrine to point out that ". . . we [are] clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." This court added:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U. S. 60 at 76.

An array of state decisions have emphasized the sanctity of the right of the accused to consult with counsel. In *In Re Snyder*, 62 Cal. App. 697, 217 Pac. 777 (1923), it was held that where a heavy wire screen made passing of papers between attorney and client impossible and other persons could hear the conversations, there was a denial of the right to consult counsel. Other state cases to the same effect, in regard to attorney-client consultation are *Ex parte Rider*, 50 Cal. App. 797, 195 P. 965 (1920); *People* v. *Shiffman*, 350 Ill. 243, 182 N. E. 760 (1932), and cases cited in the *Coplon* case at page 758. Although these decisions are not binding on the case at bar, this court used thirteen state court decisions as "support" in the *Powell* case:

> "Under the circumstances disclosed, we hold that the defendants were not accorded the right to counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. This conclusion finds *ample support* in the reasoning of an overwhelming array of state decisions, among which we cite the following: . . ." (Emphasis added.) *Powell* v. *Alabama*, supra, at 58.

Even under the less stringent standards adopted by this court in non-capital cases—whether under the circumstances the accused

suffered fundamental injustice which was seriously prejudicial—petitioner has been denied the right to counsel. The standards applicable to non-capital cases are clear in *Townsend* v. *Burke*, 334 U. S. 736 (1948), where the court pointed out at page 739 that if the accused suffers a serious disadvantage without counsel, a violation of due process occurs. The circumstances of the case at bar emphasize that at the most critical period of the proceedings against petitioner—at and immediately prior to two interrogations during which two alleged confessions were exacted—when consultation was vitally important, petitioner was denied the aid of his own counsel. The action of the State resulted in petitioner being without counsel from the very instant he knew he was a suspect until he had twice confessed to a crime for which the state seeks his life.

ARGUMENT II: THE CONFESSIONS WERE INVOLUNTARY AND THEIR USE VIOLATED DUE PROCESS OF LAW

The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment. *Leyra* v. *Denno*, 347 U. S. 556, 558 (1954). Even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict, the conviction will be set aside. *Malinski* v. *N. Y.*, 324 U. S. 401, 404 (1945). This court's criterion in regard to involuntary confessions was enunciated in *Watts* v. *Indiana*, 338 U. S. 49 (1949), where it was held:

> "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary yielding . . ." 338 U. S. 49 at 53.

A determination of the circumstances, as shown by undisputed facts, indicates that neither confession in the case at bar was free from substantial police pressure so as to be the product of a free choice. At the State's Attorney's office, petitioner, a Negro, was interrogated, while illegally detained, for approximately twelve hours by police officials questioning in relays. Kept handcuffed, never informed of his rights and denied the right to consult counsel, the accused maintained his innocence until after the assistant police chief threatened to send for Rogers' sick wife. In *Haley* v. *Ohio*, 332 U. S. 596 (1948), this court held a confession procured after only five hours of interrogation where an uneducated Negro accused was without benefit of counsel and unwarned of his rights was not voluntary. Only the age of the accused in the *Haley* case made the circumstances there less in conformance with the dictates of due process, but the court pointed out:

> ". . . Neither *man* nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." (Emphasis added.) 332 U. S. 596 at 601.

In the case at bar, the undisputed facts indicate that the first confession came only after the police threatened to bring petitioner's sick wife into custody and deliver his foster children to welfare authorities. The interrogator's fake phone calls in regard to bringing the wife into custody were admittedly designed to elicit the requested statement. The concept of due process adopted by this court voids a conviction procured on the basis of a confession induced by threats or promises. *Lisenba* v. *California*, 314 U. S. 219, 237 (1941). That threats as to conduct to be employed against other persons can violate the due process of law guaranteed to the accused is clear from the recent case of *Herman* v. *Claudy*, 350 U. S. 116 (1956) where the court held that threats to the accused's wife and children must be considered in determining if the accused is entitled to relief from a state court conviction.

Besides being procured after prolonged interrogation, threats to bring into custody petitioner's family, and a denial of counsel,

the first confession was made while the accused was in illegal custody. Of course, this court does not have the corrective power over state courts that it has over the lower federal courts as expressed in *McNabb* v. *United States*, 318 U. S. 332 (1943). But the case at bar is dissimilar from *Gallegos* v. *Nebraska*, 342 U. S. 55 (1951) where the confession was challenged on the sole basis of unlawful detention. Almost two decades ago this court emphasized that illegal custody is an element in the totality of circumstances comprising a denial of due process in the confession area:

> "From the popular hatred and abhorrance of *illegal confinement*, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there has been a charge fairly made, and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." (Emphasis added.) *Chambers* v. *Florida*, 309 U. S. 227 at 236, 237 (1940).

From the totality of circumstances—threats, denial of counsel, prolonged interrogation, and illegal detention—surrounding the extraction of the confession at the State's Attorney's office, its use was a violation of the fundamental concepts of ordered liberty and justice required by due process of law.

When petitioner made the statements to the Coroner on January 31, he did so only after he had been denied communication with his counsel at the jail. This denial in itself was enough to make the resulting confession lacking in due process. But this second confession does not stand in isolation. The Coroner admitted the impetus for his interrogation was the knowledge of the prior confession. The second statement, also made while petitioner was illegally detained, came within twelve to fifteen hours of the first. From these circumstances, the challenged confessions are, in effect, but one. The confession to the Coroner

must fall with the tainted confession made to police officers the day before. As this court pointed out recently in the *Leyra* case:

> "All were simply parts of one continuous process. . . . We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution." *Leyra* v. *Denno*, supra, at 561. . . .

The court below in sustaining the use of the two confessions challenged here, adopted a standard in patent conflict with this court's criteria of due process in the confession area. The Connecticut high court established as the test of involuntary confessions, ". . . whether, under these and other circumstances of the case, the conduct induced the defendant to confess *falsely* that he had committed the crime being investigated." (Emphasis added.) 143 Conn. 167, 173 (Appendix A, infra, p. 21). The court relied on the truth-falsity test again at page 174 (Appendix A, infra, p. 21) of the opinion where it said, "There is nothing about his illegal removal, however, to demonstrate that he was thereby forced to make an *untrue* statement" and ". . . here again, the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence *untrue* statement."

This truth-falsity standard adopted by the court below does not assure the accused the minimal protection of due process as demanded by the rulings of this court. This court has repeatedly held the use of involuntary confessions, despite the fact that there was sufficient independent evidence to insure the veracity of the statements contained therein, was a denial of due process. *Malinski* v. *New York*, 324 U. S. 401, 402, 404 (1945); *Lyons* v. *Oklahoma*, 322 U. S. 596, 597, n. 1 (1944); *Stroble* v. *California*, 343 U. S. 181, 190 (1952). In the *Rochin* case, the test approved by the Connecticut court below was unanimously rejected:

> ". . . Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them

may be independently established as *true*. Coerced confessions offend the community's sense of fair play and decency." (Emphasis added.) *Rochin v. California*, 342 U. S. 165, 173 (1952).

To sum up:

By the clear standards of this court, the confessions were exacted under conditions which make their use in a capital case a deprivation of due process of law. Only through the application of a criterion in patent conflict with this court's rulings was their use sustained by the court below.

CONCLUSION

It is respectfully submitted, therefore, that this petition for a writ of certiorari be granted to correct the errors which otherwise will deprive petitioner of his life without due process of law.

THOMAS R. ROBINSON,
Public Defender of New Haven County.

LAWRENCE M. DOOLEY,
Special Assistant to the Public Defender.
Counsel for Petitioner.

Appendix A

CONNECTICUT SUPREME COURT OF ERRORS OPINIONS

STATE OF CONNECTICUT

vs.

HAROLD D. ROGERS

Inglis, C. J., Baldwin, O'Sullivan, Wynne and Daly, Js.

(One judge dissenting)

Argued December 9, 1955—Decided January 27, 1956

Indictment charging the defendant with the crime of murder in the first degree committed in perpetrating a robbery, brought to the Superior Court in New Haven County and tried to the jury before MEEHAN, J.; verdict and judgment of guilty and appeal by the defendant. *No error.*

Thomas R. Robinson, public defender, with whom was *Lawrence M. Dooley*, special assistant to the public defender, for the appellant (defendant).

Abraham S. Ullman, state's attorney, with whom, on the brief, was *Arthur T. Gorman*, assistant state's attorney, for the appellee (state).

WYNNE, J. The defendant has appealed, after a trial to a jury, from his conviction on a charge of murder in the first degree. He was charged under § 8350 of the General Statutes with the shooting and killing of Dorothy Kennedy in the perpetration of a robbery of the package store operated by her and her husband, Joseph Kennedy, in West Haven. No recommendation for mercy having been made by the jury, the defendant was sentenced to the punishment of death. He has assigned error in sixteen particulars having to do with his trial. In brief and argument his counsel have grouped them in four categories. As thus presented, the issues concern (1) the court's refusal to grant a motion for change of venue, (2) certain rulings of the court as to the legality of the defendant's restraint on the occasions of his statements to the police and the coroner, the rulings being later reflected in the

charge, (3) the charge, which in terms discussed an attempted robbery although the indictment set forth only a charge of murder in perpetrating a robbery, and (4) several rulings pertaining to points of evidence. The defendant also assigns error in the finding of specific facts by the court and the court's conclusions, drawn from facts found, bearing upon the admissibility of statements made by the defendant to the police and to the coroner concerning the crime with which he was charged. These facts and conclusions have ample support in the evidence, and the finding is not subject to correction.

The state claimed to have proved the following facts: Dorothy Kennedy was shot and killed on November 21, 1953, in the West Shore Package Store at 143 Ocean Avenue in West Haven. She and her husband owned and operated the store. She was alone in the store at 7:30 P. M. on the day in question, and within a space of minutes thereafter the tragedy had taken place and the cash register was rifled, about $60 being taken. On January 9, 1954, the New Haven police were seeking to arrest the defendant on charges of attempted robbery, breaking and entering and theft committed that day at the Travelers Hotel in New Haven. That evening, officers located the defendant sitting in his car on Oak Street in New Haven. He had in his possession a .38 caliber Smith and Wesson revolver, which, it later appeared, he had stolen from his nephew before the shooting on November 21, 1953. He was arrested and presented in the City Court of New Haven on January 13, 1954, where he waived examination through private counsel and was bound over to the April session of the Superior Court and lodged in the New Haven County jail under a duly issued mittimus. On January 30, 1954, the revolver which had been taken from him was turned over to the state police for testing, and it was found to have fired the bullets which killed Mrs. Kennedy. Thereafter, the defendant made statements to the police and to the coroner in which he admitted that he had killed Mrs. Kennedy. These statements were free and voluntary. Their truth was not disputed by any witness at the trial.

The defendant claimed to have proved the following: On January 30, 1954, in the evening, while he was still a bound-over

prisoner at the jail, he was brought to the state's attorney's office and questioned by the police. His request to see his counsel was denied. When he disclaimed any knowledge of the shooting of Mrs. Kennedy, he was told that unless he confessed his wife would be brought down to police headquarters for questioning and their foster children would be sent to the children's building. He then gave a statement to the police which was offered and received in evidence. The following morning, January 31, the coroner by telephone instructed the sheriff to permit no one to see the defendant. Thereafter, his private counsel sought to see him, but opportunity was denied by the state's attorney. At noon on January 31, the defendant was taken to the coroner's office, was questioned and gave a statement which was later offered and admitted in evidence. The statements made by the defendant were so tainted by lack of due process of law as to be involuntary.

The defendant made two motions for a change of venue. Both were denied. The basis of the motions was the widespread publicity given the killing of Mrs. Kennedy while she was alone in the package store, and later, the publicity attending the defendant's statements to the police and to the coroner. Section 8794 of the General Stautes provides that the judge holding any term of the Superior Court may, upon motion, order any criminal case pending in that court to be transferred to the Superior Court in any other county. We have had occasion to construe this statute and have held that the court exercises a discretion as to whether the motion should be granted. *State* v. *Luria*, 100 Conn. 207, 209, 123 A. 378. The ruling of the court is reviewable to determine whether this discretion has been abused. *State* v. *Rocco*, 109 Conn. 571, 572, 145 A. 47. The burden of showing that a fair and impartial trial could not be had in the county of origin is on the defendant. *State* v. *Chapman*, 103 Conn. 453, 407, 130 A. 899. To sustain this burden, he must show more than that the crime with which he is charged received considerable publicity. He must demonstrate that the publicity was necessarily prejudicial to him and prevented his being accorded a fair and impartial trial. *State* v. *Rocco*, supra; *State* v. *Leopold*, 110 Conn. 55, 58, 147 A. 118; *State* v. *Chapman*, supra. There is

no finding of facts showing that the present defendant did not get a fair and impartial trial because of the publicity concerning the crime with which he was charged and the statements which he gave to the police and to the coroner. The court did not abuse its discretion in denying the motions for change of venue.

The second group of errors concerns the admission of the statements made by the defendant to the police and to the coroner, his so-called confessions, and the state's charge to the jury with respect to their consideration of them. As to the former, the claim is that the methods used in securing the statements were so tainted with the denial of due process of law to the defendant as to render them involuntary and therefore inadmissible. The test of the admissibility of a confession is whether it was voluntary. *State* v. *Palko*, 121 Conn. 669, 680, 186 A. 657, and authorities cited. The issue is one of fact for the trial court to decide in the exercise of a legal discretion, and its decision will not be disturbed except for the abuse of that discretion. *State* v. *Lorain*, 141 Conn. 694, 699, 109 A. 2d 504. The defendant complains that he had been committed to the county jail and that he was brought to the state's attorney's office, where he made a statement to the police, and, later, before the coroner, where he made a second statement, illegally, because the officers had no legal authorization to take him out of the jail. He also protests that he was held incommunicado and denied legal counsel before these statements were made. If we concede that this was all true and that such conduct was unlawful, it does not, standing alone, render the defendant's confessions inadmissible. The question is whether, under these and other circumstances of the case, that conduct induced the defendant to confess falsely that he had committed the crime being investigated. Unless it did, it cannot be said that its illegality vitiated his confessions. *State* v. *Guastamachio*, 137 Conn. 179, 183, 75 A. 2d 429; *State* v. *Zukauskas*, 132 Conn. 450, 459, 45 A. 2d 289.

The defendant had been lodged in the county jail on a mittimus issued in the City Court of New Haven when he was bound over to the Superior Court to await charges arising out of his arrest on January 9, 1954, in connection with an attempted robbery at

the Travelers Hotel. Proper court authorization should have been secured before the defendant was removed from the jail. There is nothing about his illegal removal, however, to demonstrate that he was thereby forced to make an untrue statement. The same can be said concerning the refusal to admit counsel to see the defendant on the morning of January 31 before he was brought before the coroner. The defendant had not requested that his attorney, Chester T. Corse, be called to the jail, and it does not appear that he knew that Corse had been refused admission to see him. The situation is essentially like that presented in *State* v. *Bateau*, 136 Conn. 113, 118-120, 68 A. 2d 681, wherein we ruled that the confessions were admissible. The further fact that one of the officers interrogating the defendant pretended, in his presence, to place a telephone call directing that the defendant's wife be brought to police headquarters and their foster children be taken to the children's building did not in and of itself make the defendant's statements to the police involuntary. Here again, the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence untrue statement. *State* v. *Malm*, 142 Conn. 113, 121, 111 A. 2d 685. The court did not abuse its discretion in admitting the defendant's statements in evidence for consideration by the jury.

As to the claimed errors in the charge as given and in the refusal to charge as requested, the essential claim is that the court should have specifically charged the jury that the removal of the defendant from the county jail to the state's attorney office and to the hearing before the coroner and the refusal to permit counsel to see him at the jail were illegal and that the jury should consider these facts in deciding whether the confessions were voluntary or should be disregarded as involuntary.

The court cautioned the jury that the admission of the confessions meant no more than that the circumstances under which they were made were such that the jury should have them for consideration and that the ruling admitting them was not to be taken by the jury as giving them any more weight than the jury should decide to give them. The court told the jury that no con-

fession or admission of an accused is admissible in evidence unless it was made freely and voluntarily and not under the influence of promises or threats, and that the employment of some artifice or deception to procure a confession does not render it inadmissible unless the artifice or deception was calculated to produce an untrue statement. The court then said: "[Y]ou will give these statements or confessions that you have before you whatever weight you consider they are entitled to, and in determining what weight you consider they are entitled to you consider all of the circumstances under which they were procured so far as these circumstances have been made known to you by the evidence. They include, among other things, the fact that the accused was in custody and under the control of the officers at the time; that he was kept in this status that has been described as incommunicado, and the other elements in the evidence before you; the manner in which he was taken from the jail to the State's Attorney's office and to the Coroner's office and what transpired on each of those occasions; the facts relating to what was said to him about his desire for counsel and everything else that you recall as being disclosed to you by the evidence, as to the circumstances under which the confessions and statements were made. All of the circumstances leading up to the making of these confessions, I say to you, are proper for you to consider in determining the weight that you are to give them. I want to repeat this. It is not wrongful for a police officer to question an accused person about an alleged crime. A confession made to a police officer is not inadmissible for that reason alone and a confession made by artifice, by trick or design, is not inadmissible for any one of those reasons alone. A confession made when a person is illegally detained is not inadmissible for that reason alone. The rules which surround the use of a confession are designed and put into operation because of the desire expressed in the law that the confession, if used, be probably a true confession. . . . . It is for you to determine what weight you are to give to them, and in that connection, as I have said, you should consider the circumstances under which they were made as the circumstances appear in evidence before you."

The question that the jury had to decide in this connection was whether the impact of the officers' conduct on the mind of the defendant was such as was likely to result in an involuntary or untrue statement. This impact would be the same whether the conduct was lawful or unlawful. Consequently, it would not have assisted the jury in their decision of the question to have been told that the conduct was unlawful. Under the circumstances of this case the charge given was correct and adequate for the guidance of the jury.

It is a play upon words to argue that the defendant was prejudiced by the court's charge discussing an attempt as well as a completed perpetration of a robbery. Whatever was done on the evening of November 21, 1953, involved the robbery of Mrs. Kennedy, who, with her husband, owned the money in the cash register. Whether she was killed before the money was taken or whether she was killed moments thereafter, we fail to see that the court was in any way enlarging the letter of the indictment. An attempt at robbery is of the same significance as an actual robbery, if in either instance a life is taken. A charge of attempt is included within the charge of a completed offense. Both crimes are included in the definition of murder in the first degree contained in the statute, § 8350, under which the defendant was charged. The indictment charges that the defendant "did in perpetrating a Robbery murder one Dorothy Kennedy by shooting her." The words of the statute "in perpetrating, or in attempting to perpetrate, any . . . . robbery" mean a killing done at any time within a sequence of events directly connected with a robbery and the escape from the scene of it. Upon the facts of this case, it is inconsequential whether the particular crime in the perpetration of which the killing occurred was actually completed or failed and for that reason could be described technically as merely an attempt. 4 Warren, Homicide (Perm. Ed.) p. 94; *People* v. *Boss*, 210 Cal. 245, 251, 290 P. 881; *Conrad* v. *State*, 75 Ohio St. 52, 70, 78 N. E. 957; *Commonwealth* v. *Hough*, 358 Pa. 247, 250, 56 A. 2d 84. Furthermore, the jury returned a verdict of guilty of murder in the first degree in perpetrating a robbery. This was consistent with the unchallenged claim of

proof made by the state that the defendant took $60 from the cash register in the deceased's package store. The court's reference in its charge to an attempt to commit robbery manifestly did not affect the verdict.

The denial of the defendant's motion for a mistrial offers the only remaining question which requires discussion. It appears that Vera Evans, a witness called by the defendant, testified that she had known him for thirty-two years, that he had been hospitalized because of carbon monoxide poisoning in 1948, and that she had noticed a change in him after that hospitalization. On cross-examination, the state's attorney asked the witness if she was aware of the fact that the defendant had committed the crime of robbery before 1948. The defendant claims that the question was improper and brought to the attention of the jury a very damaging connotation. The question was excluded, and no answer was given. Aside from the fact that the question was proper cross-examination as bearing upon the witness' knowledge of the personality of the defendant within the period of her acquaintance with him, the court not only excluded it but clearly instructed the jury that they were not to be influenced by it in any way. *State* v. *McLaughlin*, 126 Conn. 257, 263, 10 A. 2d 758. The motion for a mistrial was properly denied.

We have reviewed the several other rulings enumerated in the final grouping of errors. The defendant's exceptions to those rulings have no merit. See *State* v. *Donahue*, 141 Conn. 656, 667, 109 A. 2d 364.

There is no error.

In this opinion INGLIS, C. J., BALDWIN and DALY, Js., concurred.

O'SULLIVAN, J. (dissenting). I am in accord with that part of the opinion which deals with the court's denial of the motions for a change of venue and for a mistrial. But I am in disagreement with the ultimate result reached by my colleagues because of the court's refusal to charge, as requested, concerning the so-called confessions.

The defendant had submitted certain requests in writing in order to meet the following factual situation, which the jury might reasonably have accepted upon the evidence submitted to them: On January 9, 1954, that is, about six weeks after Mrs. Dorothy Kennedy had been shot and killed in West Haven, the defendant was arrested by the New Haven police on a charge of statutory burglary committed earlier that day at a local hotel. He immediately engaged counsel, who thereafter represented him during the time covered by the events of this narrative. On January 13, the defendant was presented to the City Court to answer to the charge of burglary. On the advice of counsel he waived examination, was bound over to the Superior Court and, in default of bail, was committed to the county jail by virtue of a mittimus pro[illegible] issued by the City Court.

Beginning on January 30, the authorities investigating the death of Mrs. Kennedy indulged in a series of illegal acts affecting the defendant. These acts culminated in his giving the two alleged confessions. The way it came about was this: About noon on January 30, the police took the defendant from the county jail and brought him to the state's attorney's office. Upon arriving there, he was told for the first time that he was to be questioned about the death of Mrs. Kennedy. He immediately asked to see his lawyer. Not only was this request refused but he was thereafter subjected to a prolonged interrogation from approximately 1 P. M. until the early morning hours of the following day. Only after the police had threatened to take his sick wife into custody and to turn his and his wife's foster children over to the juvenile authorities, and had pretended to make two telephone calls to put that threat into effect, did the defendant reverse his previous persistent denials and involve himself in the killing of Mrs. Kennedy.

On the morning of January 31, after the defendant had been returned to jail, the coroner for New Haven County ordered the jailer by telephone to hold him incommunicado, and, above all else, not to let him see his lawyer, Chester T. Corse. Shortly after this order had been given, Corse arrived at the jail and

asked to see the defendant. The high sheriff of the county, who happened to be there at the time, called the state's attorney and was told that under no circumstances was the defendant to be allowed to talk with Corse. About noon of the same day, police officers arrived at the jail, and, over Corse's objection, were permitted to interrogate the defendant again. Later in the afternoon, he was taken from the jail and brought to the coroner's office, where he made further incriminating statements. The statements given to the police and to the coroner were reduced to writing, were signed by the defendant, and were introduced into evidence at the trial.

The defendant filed a written request to charge.[1] It seems to me that, in denying the request, the court committed harmful error. Indeed, with the death penalty involved, the court should have gone even further than the defendant asked it to go. For if the jury found the facts narrated above to be true, they should have been told that at least the confession to the coroner could not, as a matter of law, be deemed to be voluntary.

The removal of the defendant on January 30 and his detention for over twelve hours in the state's attorney's office were clearly illegal. So too were his removal from jail and his detention in the coroner's office on the following day. While the investigating authorities have the duty of attempting to solve crime and of bringing criminals to trial, that does not confer upon them any right to use unlawful measures to attain their end. See *State* v.

[1] The request read as follows: "In determining what weight you should give to the confessions of the accused, you must determine whether they were given voluntarily and if you find that they were in any respect involuntary you may disregard all or any part of them. In determining their voluntariness and the weight that you should give to them, you may take into account the following factors: (a) The transportation of the accused to the office of the State's Attorney on January 3, 1954, was illegal and improper. . . . (b) The transportation of the accused to the Coroner's hearing on January 31, 1954, was illegal and improper. . . . (f) It was illegal and improper to deny the accused access to counsel, if you find that he was so denied, on January 30 and 31, 1954."

Marquardt, 139 Conn. 1, 89 A. 2d 219. Those who become suspect do not thereby become the chattels, so to speak, of the investigators. The illegal practices in the instance under discussion cannot be condoned, even though they may have conformed to a long-established custom of the county and were pursued in an effort to ascertain the murderer of Mrs. Kennedy. Until legal process, issuing from a proper source, superseded the mittimus under which the defendant was to be safely kept within the jail, the investigators had no legal right to bring him, as they did, before either the state's attorney or the coroner.

However, if the two removals of the defendant and the two detentions were the only illegal acts perpetrated on him, one might deplore them without necessarily challenging the voluntariness of the confessions that followed. But where we are met with orders barring an accused from conferring with his counsel, we reach what seems to me to be constitutional illegality. See *Stroble* v. *California*, 343 U. S. 181, 198, 72 S. Ct. 599, 96 L. Ed. 872. Such orders involve the denial of due process guaranteed by the fourteenth amendment to the federal constitution. See *Pennsylvania ex rel. Herman* v. *Claudy*, —— U. S. ——, 76 S. Ct. 223, 100 L. Ed. (advance pp. 141, 143). The court should have granted tthe defendant's request to charge and, going further, have instructed the jury that if they found that the coroner had, by an order to the jailer on January 31, barred the defendant from conferring with his counsel at reasonable times, the confession subsequently given to the coroner should be completely disregarded. No matter how evil an individual may be, he is entitled to insist that, if he is to be convicted, the verdict shall be reached upon proper and adequate instructions from the court.

Appendix B

APPENDIX OF DEFENDANT-APPELLANT BEFORE THE SUPREME COURT OF ERRORS OF CONNECTICUT

Wednesday, May 19, 1954

Morning Session

(Jurors and Alternates seated at 10:11 A. M.)

(Roll call of Jurors and Alternates by Mr. Leonard Gilhuly.)

The COURT. Be seated, please. You may proceed.

Mr. ULLMAN. Please the Court, and ladies and gentlemen: The trial of a first degree murder case is not a pleasant task. It isn't a pleasant task for anyone involved in it; not for counsel, not for the Court, and not for the jury, but, in this particular case, that task is rendered considerable easier by reason that the area of conflict between the State and the defense has been reduced so as to be almost non-existent. You will all recognize, no doubt, that there is no claim being made here, as far as I have been able to observe that this accused did not commit the crime. There is no claim here, as there is in many other cases, that the accused wasn't there; that it was somebody else. No such claim made here at all, and although, for a time, the defense seemed to want to adopt the claim of the accused as made in his confession, the claim of intimacy between the accused and the deceased, the claim of drinking for about an hour before this shooting occurred; although you remember they searched and tried to find, persistently, a bottle of liquor on the floor of that establishment as claimed by the accused in his fantastic statement made to the police and made to Coroner. (Tr. p. 613)

Raymond J. Eagan

(Sworn by Mr. Falsey)

Direct Examination by Mr. Ullman

The CLERK. State your full name, please?

The WITNESS. Raymond J. Eagan.

Q. You are Assistant Chief of Police of the New Haven Police Department? A. I am, sir.

Q. And were you such on the 30th of January of this year? A. I was.

Q. And on that day, sometime during that day, did you see the accused, Harold Rogers? A. I did.

Q. Where did you see him? A. In your office. That is eight o'clock at night.

Q. About eight o'clock at night.

Mr. CORSE. Please the Court, I think the jury should be excused before we go further at this point.

Mr. ULLMAN. Well, this is a little premature. I would say, in about two or three more questions.

Mr. CORSE. Two or three questions. A little bit of what I am afraid of, Mr. Ullman.

Mr. ULLMAN. Well, I see no—

The COURT. Go ahead.

Mr. CORSE. Have an exception, your honor?

The COURT. Certainly. Overrule the objection.

Exception may be noted.

Q. And were there other officers present? A. There were.

Q. At the time? A. Yes, sir.

Q. And did you talk to Rogers? A. I did. (Tr. p. 446)

Q. Did he talk to you? A. He did.

Q. And at sometime or other, did he make some statements to you? A. He did.

Q. With respect to the death of Mrs. Dorothy Kennedy? A. He did.

Q. In West Haven? A. He did, sir.

Q. He did. And were those statements taken down in shorthand? A. They were.

Q. By an official court reporter? A. Yes, sir.

Q. And later transcribed? A. Yes, sir.

Q. And did that statement consist of questions and answers? A. Yes, sir.

Q. Questions by you and answers by the accused? A. Yes, sir.

Q. I show you this transcript and ask you whether this is the record of the questions and answers that you have referred to? A. I would say that's it, sir.

Q. And before this, when statements were taken, were any threats made?

Mr. Corse. This is objected to, if the Court pleases. That goes to the admissibility which should be decided in the absence of the jury.

Mr. Ullman. I have no objection to that at this point.

The Court. I am going to ask you, ladies and gentlemen, to go into your room.

(The jurors and alternates retired at 2:34 P. M.)

Q. I will now ask you, Chief, first, were any threats of harm or coercion, or of any kind, made by you or by anybody in your presence to Rogers before or during the taking of this statement? A. There were not. (Tr. p. 47)

Q. Was any force or pressure used upon him? A. There was not.

Q. Was there any promise of reward of any sort offered to him? A. None.

Q. Did he answer the questions directly and freely as you put them to him?

Mr. Corse. I object to this, if your honor please. Leading, for one thing, and another thing is whether they are direct or not, will not affect the admissibility.

The Court. I think you can get the same answer, Mr. Ullman, by asking the questions in different form so that they won't be leading.

Q. How did he answer you; how did he give his answers to you as you questioned him? A. As I asked him the questions he freely answered, without hesitancy at all.

Q. And was it necessary to repeat a question several times before the accused did make an answer? A. No, sir.

Q. At the time—question withdrawn. You say that you started this questioning, I believe you said somewhere around eight o'clock? A. I arrived at eight. Shortly after eight I started to talk to him.

Q. All right. And how long did the questioning continue? A. I talked to him—I will have to give the time that was given to me, the length of time, which is approximate in my mind also, from approximately ten after eight to around 10:20. (Tr. p. 448)

Mr. ROBINSON. What was the time? 10:20?

The WITNESS. About 10:20 or a little after; 10:25, possibly.

Q. And did you talk before any transcription— A. Pardon me. I should have said that was the time I talked to him before the transcript was made. Before the statement was made.

Q. And when did you transcribe—the stenographic transcript was started? A. Oh, probably a half hour afterwards, I'd say.

Mr. ROBINSON. After 10:20?

The WITNESS. Yes, sir.

Mr. ULLMAN. I think you may inquire.

The WITNESS. My best recollection on time, I think about a half hour afterwards.

Cross-examination by Mr. Corse.

Q. To your knowledge, how long was it, Rogers was in the State's Attorney's office that day? A. I have nothing but hearsay. I don't know what time he was there. I first saw him approximately eight o'clock.

Q. You had not been there prior to that time? A. I had not, no, sir.

Q. At any time did he express a desire to see his attorney? A. He did not.

Q. Or to see Mr. Robinson? A. No, sir.

Q. Was there some discussion between you and him about the whereabouts of his wife? A. Discussion of the whereabouts of his wife? (Tr. p. 449)

Q. Yes. A. No, sir. I did talk about his wife, but not her whereabouts.

Q. Did you talk to him about having his wife brought down for questioning? A. I did.

Q. What did you say about that? A. I told him that I would figure I would call his wife down to talk to her. He wanted to know why I should bother her. I said I didn't know, but she

may have some knowledge of the thing we are talking to you about.

Q. And was that after you had said that he gave you—it he gave you the statement that was later transcribed? A. No, sir. Probably an hour afterwards.

Q. It was after that? A. After that.

Q. Did you tell Rogers that you had made arrangements for transportation to bring his wife down? A. I told him I was going to call my office to prepare it.

Q. Did you tell him that he would be less than a man if he permitted you to bring her down, as you suggested, for questioning? A. No, sir.

Q. Did you tell him that you wouldn't bring her down for questioning if he gave you a statement? A. I did not.

Q. Did you call up, in Roger's presence, and instruct your office to hold up the transportation for Mrs. Rogers for an hour? A. I made a call, yes, sir.

Q. And was that in substance, the call? A. That was the substance of the call, yes, sir. (Tr. p. 450)

Q. Whether, after the hour period—question withdrawn. Is that the hour period which you told me, a moment ago, elapsed from your first suggestion of bringing Mrs. Rogers down, to the time he made that statement? A. Approximately an hour passed, yes.

Q. You didn't bring Mrs. Rogers down, did you? A. No, sir.

Q. Did you make a telephone call in Rogers' presence with regard to having his children, or the children that were living with him and Mrs. Rogers taken care of when she was brought down? A. I made a call. I talked to no one.

Q. You talked to no one? A. That's right.

Q. You faked the call, then? A. I did.

Q. Was that for the purpose of impressing Rogers with the advisability of giving you a statement that you were then requesting? A. The general idea.

Q. Intended to give him the idea that if he did not give the statement his wife would be brought down? A. No.

Q. For questioning? A. I had talked to Rogers and when he asked me why I wanted to bring his wife down here I said that

I have to bring her down because he'd been arrested for some crime and possibly, it would be possible that he, in his excitement, knowing that he was, the question that I talked to him about, may have told his wife such things, and that was when I made the call.

Q. And that was a fake call? A. It was a fake call, yes, sir.

Mr. CORSE. Will your honor pardon me just a moment?

Q. Did you have any part in the bringing of Rogers to the State's Attorney's office that day? A. No, sir, I did not.

(Tr. p. 451)

Q. Had Rogers asked for anything to eat during the period you were there? A. No, sir. I volunteered to get something to eat and all he would take was coffee. That was just before the statement was taken.

Q. Before the statement was taken A. It had been ordered.

Q. Before he gave the statement, that was not transcribed? A. It had been ordered before the statement started, and when Mr. Lyman came in, it then started and then the coffee arrived and I asked him to have it at that time. I think possibly two minutes—two questions had been asked when the coffee arrived.

Q. Were you aware, at that time, that Mr. Robinson represented him? A. No, sir.

Q. Had you had anything to do with the investigation of the Traveler's Hotel affair? A. No, sir.

Q. Did you make any effort to find out whether Rogers was represented by counsel or not? A. No, sir.

Q. Were you present—question withdrawn. During the period you were there, was Captain Wilson of the West Haven Police also talking to Rogers? A. No, sir.

Q. Was he there while you were talking to Rogers? A. No, sir, not the first part of it. He was there when the statement was taken.

Q. When did he come in? A. He was in the outer office when I first arrived there.

Q. Which room in the State's Attorney's office did this take place? A. Well, I call it the County Detective's room, if you know which one I mean. On this end, the northeast end. As you go in, you turn to the left. (Tr. p. 452)

Q. As you go in the main door, this room is to the left? A. Yes, sir.

Q. Where was Rogers sitting? A. Rogers was seated at the end of the desk there, about three feet from the desk.

Q. Toward the outer State's Attorney's office? A. With his back towards the wall into the hallway, the judge's chambers.

Q. His back toward the judge's chambers? A. No, a little hallway that leads into the judge's—there is a door there at his back.

Q. What kind of chair was he sitting in? A. Regular chairs that's in there.

Q. Was he under any restraint, physical restraint? A. I think he had handcuffs on.

Q. Did he have anything else on? A. No, sir.

Q. By way of restraint A. No, sir.

Q. He had no— A. Belt, no, sir. I think he had handcuffs on. I am very sure he had handcuffs on him.

Q. At any time while you were with him was he released from those handcuffs? A. It is my recollection, the cuff was on one hand and the other was open.

Mr. Ullman. Was what?

The Witness. Open.

Q. Was that pair of handcuffs cuffed to the chair? A. I am certain, because I sat, later, close to him afterwards, and I remember that one wrist was cuffed and the other wasn't. Now, whether it had been on a chair previous to my being there I don't know. (Tr. p. 453)

Q. Did you know, at the time you were questioning Mr. Rogers, that he had been under interrogation by other officers for the greater part of the afternoon if not all of it? A. I was led to believe so, yes. I had no knowledge of my own other than I was told.

Q. How did you happen to come over there at that time? A. I was called.

Q. By whom? A. Sergeant Mulhern.

Q. Was it for some special purpose that he called you? A. He called me to ask me would I come down and talk to Rogers.

Q. Did he tell you what Rogers had said up to that time? A. No, he didn't.

Q. Did he—when did he tell you? A. When I arrived there.

Q. And what had he said up to that time? A. Sergeant Mulhern told me, in the few minutes I talked to him there, that they had talked to Rogers during the afternoon and had been unable to get any information from him.

Q. Any information, that is, you mean related, so far as you know, related to the case? A. That is true.

Q. Didn't Mulhern tell you that Rogers had asked for his attorney or had asked for Mr. Robinson? A. He did not.

Q. Did anyone give you that information? A. No one.

Q. You would not have informed Mr. Robinson if he had given you that information, would you? A. Under the circumstances I don't think I would. I was called. I talked to him as long as the man was willing to talk to me.

Q. Did you tell him that he was entitled to the advice of an attorney? (Tr. p. 454)

Mr. ULLMAN. Object to that, if your honor please. I know of no such rule.

Mr. CORSE. Did your honor rule? I didn't hear.

The COURT. Well, I will allow it to be answered. I will overrule the objection.

The WITNESS. Ask the question.

(Question read.)

The WITNESS. I did not.

Q. Did you tell him that anything he said would be used against him? A. I did not.

Q. Did you tell him that he didn't have to say anything to you? A. No, sir, I did not.

Q. In your direct examination, answering Mr. Ullman's questions regarding—preliminary to the statement, you were speaking only of the period between eight and ten-twenty? A. That's right, sir.

Q. You don't know what somebody else might have said to him before that time? A. I do not.

Q. Had you, at that time, received a report from Lieutenant

Chameroy regarding anything to do with Rogers? A. Not from Lieutenant Chameroy, no, sir.

Q. Well, had you received a ballistic report from someone else? A. I received a phone call from Major Remer.

Q. Did you tell Rogers that you had a definite identification of this gun? A. I told him of the ballistics, what had been reported by the State Police to us.

Q. When did you tell him that? A. While I was talking to him. Shortly after I started talking to him (Tr. p. 455)

Q. Shortly after eight o'clock, in other words? A. That's right.

Q. And he continued to deny any involvement in the case until after the fake telephone call with regard to his wife. Is that correct? A. Well, I say there was an hour's difference between the time I made the call and the time he started to talk.

Q. That I understand, but that was after he— A. Oh, that is after, yes, after the call.

Q. And after you had told him about these ballistic reports he still maintained his denial until after the call to Mrs. Rogers? Right? A. Yes.

Q. Did Rogers, at sometime during the evening, talk to Detective Flanagan in your presence? A. Detective Flanagan was present while I was talking to him.

Q. Who else was present? A. That was all, in that first period.

Q. Just you and Flanagan? A. That's all, sir.

Mr. ROBINSON. May I see the document you let me look at first, Mr. Ullman?

Mr. ULLMAN. What?

Mr. ROBINSON. May I see the transcript a minute?

Mr. ULLMAN. It isn't in evidence yet.

Mr. CORSE. Is there any objection to our having a quick look at it?

Mr. ROBINSON. I don't want to ask any questions. I just looked at it once. (Tr. p. 456)

Mr. CORSE. Mr. Robinson and I differed on a certain point.

Mr. ULLMAN. I don't know whether you should have even read it first. I will let you see it.

Mr. CORSE. I haven't any further questions of this witness, if your honor please. I think that the burden is on the State, however, to show the course of events from two o'clock on.

Mr. ULLMAN. I don't see any necessity for doing it. Have you finished? If your honor please. I think it has been established that this confession should be admitted.

Mr. CORSE. Well, I would wish to present further evidence on that point in any case, but I would assume that the State would wish to make at least some claim with regard to the two o'clock period to which this witness says—about which this witness says he knows nothing, except he knows, through hearsay, it is true, that the accused was down here from two o'clock until eight o'clock, a period of some six hours.

The COURT. Well; all I can rule on is evidence and questions of evidence, and at this time there is nothing before me for ruling.

Mr. ULLMAN. At this point I have no further evidence.

Mr. ROBINSON. Have you anything further?

Mr. ULLMAN. No, except the transcript of the confession.

(Tr. p. 457)

Mr. CORSE. In that case, if your honor please, I would put the accused on the stand for the limited purpose of going into the admissibility of the statement.

Mr. ULLMAN. That is all for the moment. (Tr. p. 458)

Harold D. Rogers

(Sworn by Mr. Falsey)

Direct Examination by Mr. Corse

The CLERK. State your full name?

The WITNESS. Harold D. Rogers.

Q. You are the accused in this case, Mr. Rogers? A. Yes.

Q. Were you brought—question withdrawn. Do you remember the afternoon of January 30? A. I do.

Q. This year? A. I do.

Q. Did you come to the State's Attorney office at sometime during that day? A. I did.

Q. And where were you during the day, prior to the time you were brought to the State's Attorney's office? A. In the New Haven County Jail.

Q. What time was it that you left the jail to come to the State's Attorney's office? A. A little after dinner time. I don't know the exact time, but a little after dinner.

Q. What time is dinner time at the jail? A. 11:30 to 12.

Q. Now, who accompanied you from the jail to the State's Attorney's office? A. I think Sergeant Mulroon. I don't know whether the other two—two detectives, I don't know who they were.

Q. Sergeant Mulhern. A. You mean when I come down—

Q. When you were brought down? A. Chief Redding—High Sheriff Redding.

Q. When you came to the State's Attorney's office. A. No. Sergeant Mulroon and two other detectives. (Tr. p. 459)

Q. Sergeant Mulhern and two other detectives, they brought you down in what sort of vehicle; what kind of car. Was it a squad car? A. I think it was squad car.

Q. Did they put any handcuffs, or similar objects on you? A. Yes.

Q. What did they do? A. They put on a pair of handcuffs.

Q. They put on a pair of handcuffs? A. Yes, sir.

Q. Between the two wrists? A. That's right.

Q. Anything else? A. Not when I came down. Not that time. They only put two handcuffs—one handcuff on me.

Q. And where were you brought too? A. To the District Attorney's office—State's Attorney's office.

Q. That is the office in this building— A. That's right. The last room.

Q. That is across the hall. And what did you do when you got there? A. They brought me in and sat me down. Nobody said nothing to me for about a hour.

Q. Where did they sit you? A. On the side facing the desk with my back up facing that way (indicating).

Q. Your back facing that way? A. That's right.

Q. Did you still have the handcuffs on? A. That's right.

Q. Were they handcuffs wrist to wrist or were they? A. Wrist to wrist.

Q. Wrist to wrist. Were those handcuffs removed at any time during that day? A. No.

Q. Now, after you arrived in the State's Attorney's office, did you have any conversation with anyone in regard to a lawyer? A. Yes, I asked Captain Mulroon. I told him I wanted to see my lawyer. (Tr. p. 460)

Q. When was this? A. After I got there a little while, when he first started talking to me.

Q. About how long after you got there? A. A little over an hour.

Q. What did Captain Mulhern say? A. He didn't even answer me.

Q. Was anyone else present at the time you asked Sergeant Mulroon—can we agree he is a sergeant, Mr. Ullman? Sergeant Mulhern. A. There's two detectives. I don't know just exactly who they were. I think one was Ruggiero.

Q. Who was your lawyer at that time? A. Mr. Robinson and you.

Q. Did you tell Mr.—Sergeant Mulhern that Mr. Robinson was your lawyer? A. No, he didn't answer me. I didn't name him. I said I wanted to see my lawyer, that's all.

Q. What happened—question withdrawn. You say that this occurred shortly after you got there, is that right? A. About an hour.

Q. About an hour after you got there? A. That's right.

Q. What had taken place during that hour? A. They told me that the gun that I was supposed to have been caught with was the gun that committed the crime in West Haven and I didn't know a thing; have any knowledge of it.

Q. You told them that? A. That's right.

Q. Did they ask you anything else? A. They said, "You did it, so why not admit it."

Q. When you say "they" said this, what do you mean by "they"? A. I am talking about Sergeant Mulroon. (Tr. p. 461)

Q. Mulhern. A. Mulhern, or whatever his name is.

Q. Anything else? A. And Lazzari sat in there with them and he said the same thing.

Q. Anything else? A. The other one didn't say anything.

Q. For how long, Harold, did they keep on questioning you in this way? A. Until Chief Eagan come in.

Q. I think Chief Eagan testified he came about eight o'clock. Is that correct? A. Yes.

Q. Is that correct, according to your memory? A. That's right.

Q. So that you were in the office from shortly after dinner time? A. That's right.

Q. Until Chief Eagan arrived at eight o'clock? A. That's right.

Q. And during all that time were they questioning you? A. Indirectly. One after the other. They said, "You did it; why don't you confait—why don't you admit it." I said I didn't know anything about it; never knew anything about the place.

Q. And what happened after Chief Eagan arrived? A. He said he was going to check my wife up and have her come down and have the two children and he picked up the telephone. I thought he was telephoning. He was talking to Headquarters. Said "Get a squad car ready to pick up Mrs. Rogers and have the matron pick up the two children and take them some place and keep them over night. Well, bring her down there for questioning, keep her down there over night if necessary." He said, "You'll be less than a man if you let your wife come down" and I knew she was sick. (Tr. p. 462)

Q. Did he say anything about holding it up for an hour? A. Yes, he said he would give me an hour, indirectly. He didn't say exactly that, indirectly, he didn't exactly say. He told them over the phone to hold that car for an hour and he could call up and tell them directly when to send for her, gave me the impression he gave me an hour to confess.

Q. Is that the reason you gave him this statement? A. That's right.

Mr. CORSE. You may inquire.

Cross-examination by Mr. Ullman.

Q. Did you use the whole hour to consider whether you were to confess? A. That's right.

Q. You used the whole hour? A. That's right.

Q. And at the end of that hour, after that hour's consideration, he went to the telephone, picked up the phone, and was it then that you made the confession? A. That's right.

Q. And that was because of what he said to you about your wife? A. That's right.

Q. Coming down? A. That's right.

Q. And did Chief Eagan say that—tell you that he felt you had committed this crime? A. That's right.

Q. And did he tell you also that he felt that your wife had some knowledge? A. No, he didn't.

Q. Didn't he say that your wife may be able to tell something about it? A. No, sir, he didn't. (Tr. p. 463)

Q. Didn't he ask you whether you had some conversations with your wife? A. Yes.

Q. Regarding that crime? A. Yes. Q. Now, you did have something to eat and drink down here, didn't you? A. I had a cup of coffee.

Q. You had something. A. I had a sandwich about four o'clock and a cup of coffee.

Q. So that you did eat your full lunch at noon at the jail? A. I didn't eat any lunch.

Q. What? A. I didn't eat up there half the time.

Q. Well, at least, it was given you? A. That's right.

Q. It was offered to you? A. That's right.

Q. You could have eaten it if you wanted to? A. That's right.

Q. Do you know whether you did eat it? A. No, I didn't.

Q. Why didn't you eat it? A. I eated in the morning, cereal.

Q. Did you eat anything at noon? A. No.

Q. Nothing at all? A. I waited until the store opened so I could get some milk.

Q. Didn't you have anything to eat at all at the jail? A. No.

Q. How soon after you arrived were you offered something to eat and drink? A. About four o'clock.

Q. Four o'clock, and what did you have then? A. Hamburg sandwich and a cup of coffee.

Q. Were you fed or did you eat it yourself? A. I ate that myself. (Tr. p. 464)

Q. And how did you hold the sandwich? A. I had one—they took one cuff off at that time.

Q. That's right. You had one cuff off? A. That's right.

Q. In other words, there were times, were there not, when you had one of your hands free? A. Only the time when I was eating, that's all.

Q. Wasn't it also free at other times during the course of that day? A. No.

Q. Was your one wrist cuffed at all to the handle of the chair at any time? A. No.

Q. All right. Now, how many sandwiches did you have? A. One.

Q. And how many cups of coffee did you have? A. One at that time and one later when Chief Eagan came in.

Q. So that you were given one sandwich and one cup of coffee? A. That's right.

Q. Were you satisfied on eating that one sandwich at four o'clock? A. I had to be satisfied.

Q. What? A. I had to be satisfied. I wasn't asked did I want any more or not. I took what I got.

Q. Did you ask for any more? A. No.

Q. Did you want any more? A. I could have used another one.

Q. You could have used another one. Were you offered something to eat after Chief Eagan arrived? A. No, they asked me did I want any coffee. I had a cup of coffee.

Q. You didn't say you wanted any more? A. No.

Q. Did you get a sandwich then—did you want a sandwich then? A. Yes, I could have stood one. (Tr. p. 464)

Q. But you didn't say so, did you? A. That's right.

Q. They asked what you wanted and you said a cup of coffee? A. He said, "Do you want a cup of coffee?"

Q. Didn't he ask you what you wanted? A. He said, "Do you want a cup of coffee" and I said "yes."

Q. You never mentioned the name of your lawyer, did you? A. To who?

Q. Chief Eagan. A. Yes, I did.

Q. I thought you said a minute ago, in answer to your counsel's question, your lawyer's question, that you didn't mention the name of the lawyer? A. I didn't name him, but I said I wanted to see my lawyer. I didn't name him.

Q. You didn't give the name of your lawyer? A. No, I didn't.

Q. At any time? A. No. The first time I wasn't even answered.

Q. At that time Mr. Robinson and Mr. Corse were representing you as your private counsel, were they not? A. That's right.

Q. They are public defenders for you now? A. That's right.

Q. But at that time they were private counsel? A. That's right.

Q. Was any force used on you at all? A. What do you mean by force?

Q. Well, what do you mean? A. You asked the question.

(Tr. p. 163)

Q. Well then, apparently none was used if you don't recognize it. I won't pursue that any further, but you did think this over for an hour? A. That's right.

Q. Before you confessed? A. That's right.

Q. And you say that you gave this confession because of the fact that you wanted to avoid the necessity of your wife A. That's right.

Q. To come down here? A. That's right. She had arthritis. She couldn't hardly walk.

Q. Is that the only reason you gave the confession? A. Because—what do you mean, the only reason?

Q. Is there anything unclear about that? A. Yes, repeat that again.

Q. You said a moment ago that you gave that confession because you wanted to avoid the necessity of your wife coming down here that night. A. That's right.

Q. And that was the reason you gave the confession? A. That's right.

Q. And did you tell the truth in the confession?

Mr. CORSE. Objected to, if the Court please.

Mr. ULLMAN. No further questions.

Mr. ROBINSON. Not material.

Mr. CORSE. I move that be stricken from the record.

Mr. ULLMAN. What?

The COURT. He didn't answer it. I know he hasn't answered it.

Mr. ULLMAN. The question may be stricken out?

The COURT. Strike out the question. (Tr. p. 466)

Mr. ULLMAN. It hasn't been answered. I don't know why it should be stricken from the record. (Tr. p. 467)

James J. Corrigan, Esq.

(Sworn by Mr. Falsey)

Direct Examination by Mr. Ullman

The CLERK. State your full name, please?

The WITNESS. James J. Corrigan.

The CLERK. Thank you.

Q. You are the Coroner for New Haven County? A. Yes, sir.

Q. And as such did you investigate the circumstances of the death of Mrs. Dorothy Kennedy in West Haven on the 21st of November, 1953? A. I did, sir.

Q. And in the course of your investigation did you, sometime, question and examine the accused Harold Rogers? A. I did, sir.

Q. And will you tell us when you conducted your examination of Rogers? A. Sunday afternoon, January 31.

Q. And where? A. In the County Court House, in Room 25, which is upstairs.

Q. And was a stenographic record made of that examination? A. Yes, sir.

Q. And by whom? A. By Mr. Robert Lyman, Mr. White's assistant, court stenographer in the Superior Court.

Q. And in connection with your questioning of Rogers and immediately preceding the actual questioning, did you make a statement to him? A. Yes, I did.

Q. And that—did that include a statement that what he said might be used against him?

Mr. ROBINSON. I object to this.

Q. And other matters? (Tr. p. 501)

Mr. ROBINSON. I ask that the jury be excused. We have had the same question here before.

Mr. ULLMAN. I think this might be done in the presence of the jury. I am not going to offer the statement until—

Mr. ROBINSON. Well, it is going to come in question with this last statement before the Coroner, as it did in the case of Captain Eagan. The thing was all gone into, the formal questions.

The COURT. I will excuse the jury. I will ask you to retire for a little while.

(The jurors and alternates retired at 10:08 A. M.)

Q. Before questioning him regarding any materials included in this case, did you first tell him who you were? A. Yes, sir.

Q. Will you read that, just exactly the words that were said, commencing with that statement wherein you told him that you were the Coroner for New Haven County. A. "Question: Well now, I think you probably have been told that I am the Coroner for New Haven County. Has anybody told you that? Answer: No. Question: Well, I am. I am James J. Corrigan, Coroner for New Haven County. Do you know what a coroner is? Answer: He tells whether a person is dead or not. Question: He does a little more than tell whether a person is dead or not. It is my duty to investigate all sudden, violent and untimely deaths. Now, I am conducting an inquest into the death of Dorothy Kennedy who was shot in her husband's liquor package store on West (501) Haven on the night of November 21 last. I am informed that you admitted that you shot that lady. Now, I am going to ask you some questions concerning that case and I want to warn you that you are under no duty to answer them if you don't wish to. Nobody may be forced to give evidence against himself. I think you are acquainted with the law in a general way. It is also that you are entitled to be represented by counsel if you wish. Now, if you do talk to me you will do so on a completely voluntary basis, just because you choose

to do it. Whatever you say may be held against you. You may be charged with the commission of some crime as result of this episode, and if you are so charged I cannot promise you any reward or immunity from punishment by virtue of or for the reason of your saying anything to me—saying anything you wish to or testifying as you chose to. Do I make myself quite clear now? A. Answer: I understand."

Q. Very well. And then did you proceed to question him regarding this matter and the related matters? A. Yes, sir, I did.

Q. And his statement or response after you made that statement to him was, "I understand"? A. That is right, sir.

Q. Did he thereafter answer your questions as you put them to him? A. Yes, he did.

Q. Did you use any pressure or coercion? A. Not in the slightest.

Q. And did you, during the course of them, make any promise of reward or immunity? A. I did not. (Tr. p. 502)

Q. Or any threats? A. None.

Q. Or were any made? A. None were made.

Q. And at that time had you issued a mittimus as Coroner? A. Yes, sir.

Q. For the detention of this accused? A. Yes, sir.

Q. On suspicion of murder? A. That's right.

Q. And do you remember, Mr. Corrigan, who brought him before you that afternoon? A. I think Captain Wilson and Lieutenant Harvey of the West Haven Police Department produced him.

Q. Do you remember whether you saw Sheriff Redding that afternoon? A. I saw Sheriff Redding. Well, I think Sheriff Redding brought him from the jail, Sheriff Redding, and I think one of his deputies, if I am not mistaken.

Q. Do you know about what time you started this examination? A. Well, I know that it was late in the afternoon. My best recollection is that it was in the neighborhood of five o'clock. I don't know exactly.

Q. Was that a busy day for you, as Coroner? A. Yes, sir, we had had an explosion, a gas explosion at the corner of Sherman

Parkway and Munson Street, in which several people were killed and others injured.

Q. And you had been engaged in the investigation of that? A. During all the morning and part of the afternoon, yes, sir.

Q. And do you you remember when it was that you issued the mittimus for Rogers under which he was thereafter held up in the County Jail? A. I know that it was in the morning I (503) know that I left the scene of the gas explosion and came to my office, and my best recollection as to that, it was sometime before eleven o'clock in the morning, that Sunday morning.

Q. And do you know what was done with the mittiams after you signed it? A. Well, I know that I sent for—I called the Detective Bureau and had one of the detectives come to my office. No, I beg your pardon. I think I called the West Haven Police, but I gave it to a police officer. Now, which one I don't recall at this point.

Q. For delivery to the jail? A. For delivery to the jail, yes, sir.

Mr. ULLMAN. You may inquire.

Cross-examination by Mr. Robinson.

Q. Now, you filed the testimony in this connection, Mr. Corrigan, with the Superior Court, in pursuance of the statute? A. Yes, sir.

Q. And the only testimony—question withdrawn. Is this statement of Rogers' the only testimony you took in that matter at any part of your investigation? A. It is.

Q. Don't you remember, when you asked to have the accused brought to your office, that you had a request from the Sheriff that there was no Coroner's warrant at the jail and you should get one there? A. I don't remember that, no.

Q. Do you recall the time that you—question withdrawn. Did you get some information which you put into your finding in this case from sources other than the testimony which appears here?

(Tr. p. 504)

Mr. ULLMAN. Objected to, if your honor please. What has that got to do with this issue?

Mr. ROBINSON. Preliminary question.

Mr. ULLMAN. Have the question read?

The COURT. Read it, Mr. Whay.

(Question read.)

Mr. ULLMAN. Object to that, if your honor please. The mere fact that it is preliminary does not make it admissible. It is not relevant to anything here?

The COURT. What does make it relevant?

Mr. ROBINSON. Shall I disclose my purpose, on cross-examination?

Mr. ULLMAN. I don't think—where it doesn't appear to be relevant I think counsel is under a duty to disclose.

Mr. ROBINSON. I withdrew the question, Mr. Ullman.

Q. You knew that this man at that time had a request made, didn't you, Mr. Corrigan, of counsel to visit him at the jail before you had him brought down? A. No, I don't know that, Mr. Robinson.

Q. Didn't you know, or weren't you informed by the jail, that Mr. Corse had been there and had requested an opportunity to see this man on the very day you had him brought up before this investigation? A. No, sir, I don't recall any such thing.

Q. You had certain information, apparently, from the nature of your questions and statement to this accused, when you saw him, concerning what he had said the night before. A. Is that a statement or a question, Mr. Robinson? (Tr. p. 505)

Q. I am asking you, isn't that so?

Mr. ULLMAN. You were not asking him that.

Q. Let me ask you. Isn't it so that you had been pretty well informed as to what had transpired in reference to Rogers before you had him brought down? A. Well, yes, sir, in a general way, I knew that he had confessed this crime and knew pretty much the details of his confession.

Q. And who told you that? A. Oh, Captain Wilson, I think it was.

Q. And when did he tell you that? A. Saturday, sometime.

Q. Was it after one o'clock in the morning on—wasn't it after one o'clock on Sunday morning, the 31st? A. My best recollec-

tion is that it was sometime Saturday afternoon. I could have been. I make no memoranda of these things.

Q. Have you followed the testimony here that there was no statement, incriminatory statement, given by Rogers, until, well, late in the evening of the day he was here in the State's Attorney office? A. I have not been in this court room but about five minutes in total, during the progress of this case.

Q. It is rather unusual for you to have hearings in Coroner's cases on Sunday, isn't it? A. Not at all, no.

Q. You didn't use your usual stenographer on this case? A. That's right. (Tr. p. 506)

Q. And—you say that you—this man was given the instruction that you have read? Did you give him any other instruction in any more simple language than the one you read off your notes here? A. No.

Mr. ULLMAN. Object to that, if your honor please. I think that is simple enough. Object to the designation.

Mr. ROBINSON. I mean simple language, understandable language.

The COURT. Well, this is cross-examination. I will allow it.

The WITNESS. No, sir, I didn't warn him otherwise than as appears in the record.

Q. And that is more or less stock warning that you give in every case, isn't it? A. Oh, I should say so.

Q. Now, you were talking, apparently, to a man who didn't know the difference between a coroner and somebody who told whether a person was dead or alive, weren't you? A. I didn't say he didn't know the difference, Mr. Robinson.

Q. Well, didn't he answer your question immediately before you gave him that statement, as to whether he knew what a coroner was, his answer was, "He tells whether a person is dead or not?" A. I believe that the average layman would—

Q. Will you please answer that? You are talking to a person who had made that inquiry, weren't you? A. Yes, sir.

Q. I suppose you didn't believe it. That is your position? A. Well, you may suppose, Mr. Robinson.

Q. Well, did you believe it? A. Well, I didn't believe his knowledge was limited—

The COURT. Believe what, Mr. Robinson? (Tr. p. 507)

Q. Believe that he was talking to a person which had that particular idea about what a coroner was. Did you believe the statement that he made as to what his idea of a coroner was?

Mr. ULLMAN. Well, I object to this, if your honor please. It appears that the Coroner disabused him of that notion.

Mr. ROBINSON. I object to that language, "disabused."

The COURT. Go ahead, Mr. Robinson.

The WITNESS. My answer is that because he said "He tells whether a man or person is dead or not" that doesn't limit his knowledge or his idea of what a coroner is. He hit the high spots, so to speak. He didn't make a long speech informing me of all the duties of the Coroner.

Q. Well, he didn't even inform you correctly on that, that that is not your function, to determine if a person is dead or not. That is the Medical Examiner's function, isn't it? A. I should say it is mine.

Q. All right. Well, after you got that answer, did you explain to him at any time what who you mean by "untimely death?" A. No, I didn't.

Q. Did you explain to him what you meant by the use of the word "inquest?" A. No, sir.

Q. Now, you made a statement to him that you thought he was acquainted with the law in a general way. Did you have (508) any basis for the assertion? A. Simply because I knew that his brother was a policeman and that he was a man of average intelligence and that he would be acquainted with that in a general way.

Q. You didn't make any effort to explain to him that in your particular tribunal that he was entitled to be accompanied by counsel, did you? As provided in the statute? A. I didn't tell him that it was statutory, but I did tell him that he was entitled to be represented by counsel.

Q. Right then and there in your—and be accompanied by counsel right then and there in that inquest? A. Well, I didn't say "right here now, in this inquest," but I told him that he was entitled to be represented by counsel before he testified. That is the effect of it.

Q. All you said to him was this: "I think you are acquainted in a general way and also—it is also so that you are entitled to be represented by counsel if you wish to." A. That's right.

Q. But you didn't explain to him that he had a present right, given to him by statute, to have a lawyer with him then and there, did you? A. Well, if that is not the fair intendment of that statement, then I guess perhaps I—

Q. You didn't tell him anything other than what is here, did you? A. No, sir, I did not.

Q. It didn't occur to you at that time to explain to the effect that he had a right, for him to ask to have his counsel, whoever he was, there beside him to advise him; if that is what you intended to convey to him, you didn't go any further than this, did you? A. I thought that that was clear enough and I didn't go any further. (Tr. p. 509)

Q. You didn't call up any lawyer. You didn't even call the Public Defender, did you? A. Why should I? Of course, I didn't.

Q. I asked you whether you did or not. A. No, I didn't.

Q. You didn't want him to be represented by counsel before you got this statement out of him, did you?

Mr. ULLMAN. I object to that.

The COURT. I will overrule the objection. The question may be answered.

The WITNESS. That doesn't follow.

Q. Well, was it so or not? A. It was not so that I didn't want the public defender or other counsel there. I warned him his rights, and that is as far as I am required to go.

Q. And no further? A. No further.

Q. And did you explain to him what you meant when you said "If you talk to me you do it on a voluntary basis;" did you explain to him what you meant by the use of the word "voluntary?" A. Why, I think that needed no explanation.

Q. Perhaps, but did you? A. I did not, sir, no.

Q. Did you explain to him what you meant by the use of the word "immunity" when you said to him "I cannot promise you any reward or immunity?" A. I think the very next clause, "immunity from punishment."

Q. "Immunity from punishment." You said that? A. Ye

Q. Did you explain to him what you meant by immunity from punishment? A. No, sir. (Tr. p. 510)

Q. And then you went on to tell him this, you couldn't make any of these promises by virtue of or for the reason of your saying anything you wish to or testifying as you choose to. You didn't intend, in that, any further direction than he was—he had no obligation to speak at all, did you? A. No, sir.

Q. Then you asked him, "Do I make myself quite clear now" and the accused answered "I understand." A. Yes, sir.

Q. And with that you immediately started out, "How old are you" and so on and so forth? A. Yes, sir.

Q. Now, Mr. Corrigan, you have not the slightest doubt have you, that if you explained to this accused so that he understood it, that he had no obligation to make any statement to you, and that he had a right then and there under a statute to be represented by counsel, that he would have asked you for a lawyer? A. I don't agree to that at all, sir. He was perfectly well apprised of his rights, and it is my opinion that, no matter what I said to him by way of warning, that he still would have chosen to testify voluntarily.

Q. You thought that because you were informed that he had given some sort of a statement the day before, is that correct? A. Partially, yes, sir.

Mr. ROBINSON. I think that is all.

The WITNESS. Also from his attitude.

Mr. ROBINSON. Just a minute. (Tr. p. 511)

Q. Was it—I want to ask you this, wasn't it—did you leave instructions at the jail along with your warrant, that he was not to see counsel until that permission was given by you? A. I left instructions that he wasn't to see anybody; that he was to be held incommunicado until I lifted that order.

Q. Now, have you any authority for such an order in this or any other case, Mr. Corrigan? A. Yes, sir.

Q. And what is it? A. The statute says that I may order witnesses to be kept separate until after they thereafter testify

Q. And is that the only authority you can call attention to? A. That is enough, I think.

Q. And you construe that and put it in practice in all of those cases, don't you? A. That is right, sir.

Q. That he was not to see counsel until you said it was all right for him to see counsel? A. Not to see anybody.

Q. Yes, but that included counsel, didn't it? A. Yes, sir, it did.

Q. As a matter of fact, the practice in your office, so far as it can be enforced, is that whenever a person is arrested on your warrant, they cannot have access to the advice or presence or visit of an attorney. Isn't that so? A. That is so, in the first instance.

Q. And it is only after you think that it is an appropriate time or after you had your interrogation, where you have interned him, these accused, that they have a right to counsel that you lift the ban and let a lawyer see them? Isn't that the way the thing is run in this county? A. May I have the question read, please?

(Tr. p. 512)

The Court. Read it, Mr. Whay.

(Question read.)

The Witness. Yes, I lift the ban at the appropriate time in my judgment.

Q. You allow the State's Attorney to interrogate an accused whenever he wants to, don't you? A. The State's Attorney, to my knowledge, has never requested that he examine an accused.

Q. Well now, Mr. Corrigan, you are an appointee suggested by the State's Attorney, aren't you? A. I am appointed by the judges of the Superior Court upon nomination of the State's Attorney.

Q. Yes, sir, and also isn't it so that this man that you impose upon the conduct of an accused person, which you call "incommunicado," because there isn't any English word, I suppose, that describes it—

Mr. Ullman. Humph.

Q. Does not prevent the State's Attorney's Office and his detectives, generally, talking with the accused?

Mr. ULLMAN. Well, I object to that. This is irrelevant to anything at issue, because nothing like that—

Mr. ROBINSON. Right at this point I am specifically—

The COURT. I will sustain the objection.

Mr. ULLMAN. Nothing like that was shown.

Mr. ROBINSON. Have an exception.

Q. Didn't you allow this accused, after you had issued your warrant, to be visited by detectives and have his hands photographed? (Tr. p. 513)

Mr. ULLMAN. I object to that, if your honor please. That is after this statement was given.

The COURT. I will overrule the objection and allow the question to be answered.

Mr. ULLMAN. I don't know. It might not have been after. I'm not sure.

The WITNESS. I honestly don't remember just what time anybody from the police department saw him, after I saw him or before I saw him.

Q. Well as a matter of fact, they didn't ask you that. They have blanket authority to go any time they want, don't they, the police? A. No, they don't.

Q. Don't you know that photographs were taken of parts of this man's body while your warrant was holding him, as you call it, "incommunicado?"

Mr. ULLMAN. I object to that, if your honor please. There is no evidence that that is so.

Mr. ROBINSON. I am asking him whether it is so.

The COURT. Asking him whether that is so. I will allow it.

Mr. ULLMAN. All right.

The COURT. Overrule the objection.

The WITNESS. I don't know, sir.

Q. Did you authorize, in this particular case, the State's Attorney's office, or the State's Attorney's office and his assistants, or anybody else in charge, to refuse counsel access to on your behalf, this accused, at any time? (Tr. p. 514)

Mr. ULLMAN. I object to this unless it is a time prior to the taking of this testimony.

Mr. ROBINSON. I will claim it was a time prior to the taking of this testimony by several hours, and we were trying to get a writ out.

(Question read.)

Q. So that, if such a refusal eminated from the State's Attorney's office, that is something that you had not authorized or empowered somebody to make on your behalf? A. I don't know anything about the State's Attorney's office issuing any such ban at all, and it was not to me, with prior consultation with me. I never knew that any such thing ever transpired.

Q. And you were not consulted about it, if any such request was made following the taking of the statement of this accused? A. That's right.

Q. So that it is fair to say, so far as you know, if such refusal was made, it was or somebody else's authority, without any knowledge on your part at all? A. Yes, sir, that is right.

Q. Well, let me ask you this. Is it your construction of the events that you have detailed that, sometimes in the morning of the 31st, you issued what we call—what is known as a Coroner's Warrant? A. Yes, sir.

Q. And the issuing of that simply means that you get somebody to type up the blank and you sign it, don't you? A. In this case I did that myself. (Tr. p. 515)

Q. I thought it looked like very clever typing. I am sure it is quite so. May I see the exhibit for identification? Now, are these warrants sometimes mailed to the jail? A. No, sir.

Q. And you are familiar with the statute under which those warrants are issued, I assume? A. Yes, sir.

Q. And you know the form of this warrant pretty well? A. Yes, sir.

Q. And the warrant, in this case, commanded the sheriff, after he received the person, to keep him in confinement at the jail? A. Yes, sir.

Q. It does not contain, as some warrants do, that I have seen issuing from your office, a designation of some other place of confinement, does it? A. No, sir.

Q. And you made no determination of no other appropriate

place of confinement in this case than the New Haven County Jail, did you? A. That is right, sir.

Q. And it is your impression, at least that in no perhaps specific—when this warrant was lodged at the jail that after its lodgment there, that this man be held under this warrant without bail? A. Yes, sir, that is right.

Q. By virtue of what authority do you order people that are under such a warrant of confinement to be taken to any place other than the jail?

Mr. ULLMAN. I object to that, if your honor please. Unless it relates to being taken before the Coroner. That is the only thing we are concerned about.

Mr. ROBINSON. Well, I will correct the question so that I will include in the question that statement. (Tr. p. 516)

Mr. ULLMAN. Very well.

Q. By what authority do you order people held at the jail under your warrant to be taken to your office or any other place you want them taken? A. The statute specifically gives me that authority.

Mr. ULLMAN. Object to the last part of the question. What was the answer?

Mr. ROBINSON. The statute specifically gives me that authority.

The WITNESS. The statute says "Or other proper place."

Q. But it is—is that the authority under which you act? A. Yes, sir.

Q. And I just asked you whether you made any finding about any other proper place, in this case, as you have to under that statute? A. No, I made no such designation.

Q. And all you did was to call up the jail and say, 'Sheriff, bring him down to the office" or words to that effect, isn't that so? A. That's right.

Q. And that procedure was not taken by virtue of the statute or any other authority that you claim would authorize it? A. No, sir.

Q. Now, is this the warrant that you issued. I think you have been shown Defendant's Exhibit 5 for identification? A. Yes, sir; yes, I have.

Q. That you issued on that day? A. Yes, sir

Q. And there was no other paper that you issued concerning the custody or the arrest of this accused, or in this case, generally except that one? A. I think that is right. (Tr. p. 517)

Q. Were your statements in your finding in this case based upon evidence, sworn evidence that you had taken?

Mr. ULLMAN. I object to this, if the Court please. No part of the issue that is presented before us.

The COURT. Sustain the objection.

Mr. ROBINSON. I think that is all.

Redirect Examination by Mr. Ullman

Q. Your authority to order a man held incommunicado for a reasonable time is subject to review on habeas corpus, is it not, before the court?

Mr. ROBINSON. I object to that. That calls for a question of law which I think certainly is not—

Mr. ULLMAN. I think, as long as the jury is absent, and in view of the questions of counsel, I certainly think that is a proper question.

Mr. ROBINSON. Whatever his notion of it is make no difference.

The COURT. It may even enlighten me. I will allow it. Overrule the objection.

Mr. ROBINSON. Have an exception?

The COURT. Exception may be noted.

The WITNESS. Yes, sir.

Q. Have your orders to hold persons incommunicado for reasonable periods, been upheld on previous occasions after applications for a writ of habeas corpus? (Tr. p. 518)

Mr. ROBINSON. Object to that. Opens up a lot of collateral issues. All the cases I can ask about under the circumstances.

The COURT. I suppose, Mr. Robinson, justification for the question, is this. You questioned the propriety of the procedure that he followed and this is merely, I think, to make that, on questions of a similar nature to recite as facts something that hap-

pened which gives him the right to feel that he is doing what is proper.

Mr. ROBINSON. It isn't really a question of disputing the matter. It is some hi[illegible] that perhaps becomes more or less apparent by the answers. The only quest on whether it is or is not a legal procedure.

The COURT. Well, you asked whether he felt that he had a right to do what he did.

Mr. ROBINSON. I asked him under what authority he did it and he answered "under the statute." Now, he pointed out—it is definitely a question for determination sooner or later.

The COURT. I will allow it.

Mr. ROBINSON. All right. I hope your honor will extend the opportunity to me. If the door is opened.

Mr. ULLMAN. I think the door is already open.

Mr. ROBINSON. All right.

Mr. ULLMAN. And I am just moving in.

Mr. ROBINSON. You move in and a little later I will get what I can out of it.

The COURT. I will allow the question. (Tr. p. 51)

(Question read.)

The WITNESS. Well, my best recollection is that none of them ever went to conclusion. Applications have been made by counsel from time to time and the courts have ruled informally that it was reasonable for the Coroner to have an opportunity to interrogate a suspect and these things have always been worked out by way of compromise. The Court would ask, "Now, how long do you suppose it will take" and "Well," I said, "I think tomorrow afternoon at two I shall be finished" and that was the procedure: I think none of them ever went to—

Q. Have your orders, before, ever been interfered with after applications—

Mr. ROBINSON. Well, I object to that.

Q. — after applications on habeas corpus.

Mr. ROBINSON. That certainly calls for—goes beyond your honor's ruling.

The COURT. I will overrule the objection and allow it, and an exception may be noted.

The WITNESS. No. No court has ever issued a habeas corpus requiring me to produce an accused.

Q. When did you lift this order for incommunicado, then, as it concerns this case? A. I am not certain. It seems to me that it was either on Monday or the next day, or on Tuesday, the day following, so I am not certain as to that.

Q. So that you held this prisoner incommunicado for not much more than twenty-four hours? A. That is substantial correct.

(Tr. p. 520.)

Q. And also, in connection with your authority to have the accused brought before you, you have testified that it is the statute that you can either designate the jail or other place, and in addition to that, you have statutory authority to have the witnesses summoned and produced before you? A. Yes, sir.

Q. That is part of your authority? A. It is, sir.

Q. All right. And also, in your use of those authorities, will you look at the transcript while I question you on it. I notice that, at one point, you stated "I am going to ask you some questions." Do you see that? A. Yes, I do, sir.

Q. Did you tell him that? A. I did.

Q. And was that after you had made the statement or used the word "inquest?" A. Yes, subsequent to that.

Q. So that, in effect, is the translation or interpretation of the word "inquest," is it not, so far as it relates to this accused? A. I should say so, yes, sir.

Q. And you went on to say, did you not, "You are under no duty to answer that," referring to the questions "If you don't wish to." 'Did you make that statement to him? A. Yes, sir.

Q. And did you go on to elaborate "Nobody may be forced to give evidence against himself?" A. I did, sir.

Q. And did you also say "It is also true that you are entitled to be represented by counsel if you wish?" A. Yes, sir.

(Tr. p. 521.)

Q. And then, did you say, "Now, if you do talk to me you will do so on a completely voluntary basis, just because you choose to do it?" A. I—

Q. Did you tell him that, sir? A. I did, sir.

Q. Then did you go on to say, "Whatever you do say may be held against you?" A. Yes, sir.

Q. "And you may be charged with the commission of some crime," did you say that? A. Yes, sir.

Q. And was it then that you told him "If you are so charged" you could not promise any reward or immunity from punishment? A. Yes, sir.

Q. Is that correct? A. Yes, sir, it is.

Q. And did you then, at the conclusion of that, say to him, "Do I make myself quite clear now?" A. I did, sir.

Q. And did he say "I understand?" A. Yes, sir.

Mr. ULLMAN. No further questions.

The COURT. I think I will take a recess at this point.

(Tr. p. 522)

(The following proceedings were continued in the absence of the jury at 11:57 A. M.)

Recross-examination (Continued) by Mr. Robinson.

Q. Mr. Corrigan, you recall something about the time when this statutory change was made in reference to the presence of counsel at your hearings? A. Yes, sir.

Q. Do you recall that even before that statute was on the books there were habeas corpus writs issued by the Court and responded to by somebody in reference to cases that you were holding under this incommunicado order? A. There had been a few, a very few.

Q. Isn't it so that whenever they got to court it had pretty generally been suggested by the presiding judge in these informal talks that, "Mr. Corrigan, it might be just as well to make some settlement on this rather than have a ruling on the propriety of the procedure?" A. That was the procedure usually—always followed, I think.

Q. You remember a case where specifically it was suggested unless you wanted to have a ruling on this in the coroner's office, that this particular order, in the particular case, should be immediately modified? A. I don't know about "immediately modi-

fied." My best recollection is that the Court would ask, "Well, how, how much more time do you think you will need?" And we discussed it back and forth and, generally speaking, it seems to me that the court invariably said, "That's reasonable; it would take me at least that long to decide it, so the thing is academic anyway," and, "Is that all right?". And counsel would usually acquiesce. That has been the history of all of them. (Tr. p. 523)

Q. With the man in the court house not being interrogated by you?

Mr. ULLMAN. I don't know what that question is.

A. What do you mean by that?

Q. I mean, specifically, do you remember the case of Walter Law, where a writ of habeas corpus brought Mr. Law to the court house in a room upstairs before the Superior Court? A. Oh, I don't—I really can't remember specifically. I don't have a clear recollection of that.

Q. Don't you recall in that case, if I can refresh your memory, who ever the presiding judge was, and my memory is it was probably Justice O'Sullivan, it was suggested to the coroner that without a decision on this it would be just as expedient to have the ban immediately lifted so that counsel could confer with Walter Law in the court house then and there? A. It could have been. I honestly have no recollection as to that.

Q. And that, of course, was some time before 1945 when this statutory change was made? A. Yes, sir, I think it was.

Q. Were you familiar with the procedures or the reasons behind this statutory change in the legislature when it was being discussed?

Mr. ULLMAN. Object to this.

The COURT. Sustained.

Mr. ROBINSON. May I have an exception. (Tr. p. 524)

I think that's all.

Mr. ULLMAN. No further questions. I offer the statement.

Mr. CORSE. Sheriff Redding, will you take the stand, please?

The COURT. That's all.

Mr. ULLMAN. No further questions. (Tr. p. 525)

APPENDIX C

Appendix of State of Connecticut before the Supreme Court of Errors of Connecticut

Raymond J. Eagan.

Direct Examination (continued) by Mr. Ullman

Q. I think you had stated, Chief Eagan, that you arrived here at the State's Attorney's Office some time shortly after eight o'clock and questioned the accused? A. That's right.

Q. And the accused at that time, I think you said, was seated in a chair in one of the rooms in the State's Attorney's office? A. That's right.

Q. Will you tell us in what condition he was seated there? A. Rogers was seated in a chair there with handcuffs, as I said before—one cuff was free and the other was on a wrist. That is my best recollection of it.

Q. I see. In other words, the cuffs were attached to one wrist? A. That's right.

Q. And the other wrist was free? A. That's right, sir.

Q. Did he move his arms around? A. He played with the loose cuff, just around the arms of the chair.

Q. Aside from that did he move his hands around for other purposes? A. He smoked cigarettes, mine and his, and one of those present ran out and he had coffee and he had more cigarettes brought to him.

Q. Before having coffee did you have some conversation with him regarding something to eat? A. I did.

Q. What was that? A. I don't remember who was going out, but somebody volunteered to go out and get something to eat and Rogers was asked what he wanted, if he wanted anything else besides coffee, and he said no, all he wanted was coffee. Others had sandwiches and he had coffee.

Q. Sandwiches and coffee were brought in? A. That's right.

Q. Did the accused eat anything, he just drank coffee? A. That's right.

Q. And for how long a period did you question him before any transcription was made? A. About two hours and ten minutes.

Q. Were you doing the questioning? A. I was.

Q. And was it repeated—or continuous, rather, or were there pauses and interruptions? A. There were breaks.

Q. There were. And during all that time the accused was seated? A. That's right, sir.

Q. In asking him questions did you make any threats against him? A. I did not.

Q. No threats of inflicting harm or damage or anything else to him? A. No, sir.

Q. Did you make any promises of immunity or of reducing the penalty or anything else? A. No, sir. I told Rogers that nothing that he talked to me about, if he did talk, could be of any benefit to him, it would be up to the Court or jury, whatever he made any statement to, that I as a police officer had no power or right to offer him anything.

Q. Did you use any coercion upon him at all? A. No, sir.

Q. Or any force? A. No, sir.

Q. How did he answer the questions as you put them to him? A. His responses were direct, right as soon as the question was asked.

Q. Did you have to press him for answers in any instance? A. No, sir.

Q. And at some time was there some discussion about his wife? A. There was.

Q. Will you tell us what that was. A. I talking to Rogers I told him I felt I would have to bring his wife down and talk to her. He said, "Why do you have to do that?" I said, "Because you have been under arrest and now that this thing has happened, you still had the gun, it may be that your wife in a visit to the jail, you informed her of other trouble you might be in." He said, "Well, she wouldn't know anything about anything I do." I said, "Well, I don't know that. It may be possible a man in trouble would tell his wife what trouble he was in." That's all I said to him.

Q. And at sometime or other did he make some statement regarding this affair of November 21? A. He did.

Q. What did he say? A. Well, the first thing he said was—

Mr. CORSE. Object to that, if the Court please, for the record.

The COURT. Overruled.

Mr. CORSE. May I have an exception?

The COURT. Exception may be noted.

APPENDIX D

Defendant's Exhibit 4

5/13/54

RRL

Office of

STATE'S ATTORNEY

New Haven County

New Haven, Conn.

Abraham Ullman,
State's Attorney,

Arthur T. Gorman,
Assistant State's Attorney.

January 30th, 1954.

Mr. Daniel Patterson,
New Haven County Jail.

This will authorize you to allow Detectives to take Harold Rogers to the State Attorney's Office for questioning.

ABRAHAM S. ULLMAN,
per
EDMUND S. FLANAGAN,
County Detective.

STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOR COURT

I, Edward Horwitz, clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of Exhibit 4 in the records of this Court in the case of #9905 *State of Connecticut* vs. *Harold D. Rogers.*

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 20th day of March, A. D. 1956.

EDWARD HORWITZ, Clerk.

[SEAL]

APPENDIX E

General Statutes of Connecticut, Revision 1949

Sec. 485. Power of Coroner in Securing Evidence.

For the purpose of securing evidence, the coroner may enter any and all places in his county; shall have power to issue a warrant for a jury inquest, to compel the attendance and testimony of witnesses by subpoena and capias issued by him or other proper authority and to punish for contempt to the same extent as justices of the peace may in criminal cases; he may order and cause witnesses to be kept separate so that they cannot communicate with one another until they shall have testified; he may order or cause any person or persons whom he has good reason to suspect of having criminally caused the death in regard to which he is holding an inquest to be arrested and committed to the county jail or other proper place; he shall have power to take bail in such cases or to commit without bail when in his opinion the person arrested is guilty of a capital offense and when the proof against such person is evident or the presumption great. When bail shall be taken, it shall be to the state and shall be conditioned for the appearance of the person so arrested before

the superior court for such county at its next criminal session. Any person so arrested and admitted to bail may be rearrested and committed by the coroner without bail when, in the opinion of the coroner, the proof shall be evident or the presumption great that such person is guilty of a capital offense. In no case shall any person be kept under arrest by an order from a coroner for a longer time than twenty-four hours after the finding of a verdict by the jury or after the finding by the coroner in such inquest; and, at any time before such finding, whenever the grounds on which a person is so arrested shall cease to exist in the opinion of the coroner, he shall order the release of such arrested person.

Sec. 8727. Binding Over on Probable Cause.

When any complaint for any criminal matter cognizable by the superior court shall be legally brought before a trial justice, he may inquire into the facts relating thereto; and, if he shall find that probable ground exists for its support, he may, if the offense be bailable, order the accused to enter into a recognizance with surety to the state, conditioned that he shall appear before the criminal session of the superior court next to be held in the county where such bond is taken, to answer to the complaint and abide the order or judgment of said court thereon, and, on his failure to enter into such recognizance, or, if the offense complained of be not bailable, such trial justice shall order him to be committed to the jail in said county until the next criminal session of said court or until he shall be discharged by due course of law; but all cases of binding over by trial justice, or by any borough, police or town court, in the county of New Haven, within the judicial district of Waterbury, shall be to the criminal session of the superior court next to be held at Waterbury; and all cases of binding over in New Haven county outside of said judicial district shall be to the criminal session of the superior court next to be held at New Haven.

RESPONDENT'S EXHIBIT 1

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 881

HAROLD D. ROGERS
Petitioner

vs.

STATE OF CONNECTICUT
Respondent

STATEMENT OF THE CASE

In amplification of Petitioner's Statement certain uncontradicted facts, altogether independent of the confessions, are herein set forth.

On the very evening that Mrs. Kennedy was shot and killed during the robbery at her store, petitioner's nephew George Evans discovered that his revolver and cartridges were missing from a bedroom of his home. Petitioner had visited the Evans home that afternoon, and, for this reason particularly, Evans sought him out the following day and accused him of taking the gun. However, petitioner steadfastly denied the theft whereupon Evans and petitioner went to Police Headquarters and reported that the gun had been stolen by a person unknown (Record pp. 9-10).

On January 9, 1954, a robbery, theft and breaking and entering were perpetrated at the Travelers Hotel in New Haven for which crimes the police arrested petitioner. In his possession at the

time of his arrest was the stolen Evans revolver. Upon being questioned by the police, petitioner at first maintained that he had won the gun in a "crap game" that afternoon. However, in further questioning the following day, he admitted having stolen the gun from his nephew's home on the afternoon of the Kennedy murder. In the meantime in an effort to conceal the identity of the gun, petitioner had filed its serial numbers (Record p. 10).

The murder remained unsolved until January 30, 1954, when ballistics tests by the State Police established that the revolver taken from petitioner had fired the bullets which killed Mrs. Kennedy (Record p. 10).

REASONS AGAINST REVIEW BY THIS COURT

1. The issues raised here were fairly and fully tried and reviewed in the Court below.

2. The undisputed facts of this case do not indicate the use of incorrect constitutional standards of judgment as heretofore set forth by this Court.

3. No right guaranteed by the Due Process Clause of the Fourteenth Amendment was violated in the procurement and use of the confessions.

4. The use of the confessions obtained under the circumstances of this case is by no means repugnant to "that fundamental fairness essential to the very concept of justice." *Lisenba* vs. *Calif.*, 314 U. S. 219, 236 (1941).

5. No substantial constitutional question is presented here.

ARGUMENT

I

TWO COURTS AND A JURY DETERMINED THAT THE CONFESSIONS WERE MADE FREELY AND VOLUNTARILY

On motion of petitioner, the Trial Court in the absence of the Jury heard evidence at great length as to the circumstances surrounding these confessions. Thereafter in ruling the confessions freely and voluntarily made, the Court made two Findings of facts (Record pp. 38-42; 42-45). In the course of the trial the Jury passed upon these same claims and circumstances and by its verdict found that the confessions were not adversely affected thereby. The issue was again presented to the Supreme Court of Errors and there for the third time was determined adversely to petitioner's contentions. A criminal prosecution thus approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect Federal constitutional rights. *Gallegos* vs. *Nebraska*, 342 U. S. 55, 60 (1951).

We submit that there is here no such clear proof. On the contrary, it is amply evident that there were present no such circumstances as have led this Court to hold in certain cases that convictions upon the basis of forced confessions were in violation of the Due Process Clause of the Fourteenth Amendment. The evidence here is not such as to impel this Court to "set aside the finding of two courts and a jury and adjudge that the admission of these confessions was so fundamentally unfair, so contrary to the concept of ordered liberty, as to amount to deprivation of due process." *Lisenba* vs. *Calif.*, supra at p. 238.

II

THE CONFESSIONS WERE NOT PROCURED THROUGH COERCION

Petitioner does not so much as suggest that the action of any officer before or during the making of either confession was

accompanied by force or by the threat of force. As to his confession to the Coroner (Exhibit WW) petitioner makes no claim of coercion, either physical or psychological. His sole contention on this point relates to his confession to the police (Exhibit VV) which he asserts resulted from psychological pressure by prolonged interrogation while handcuffed and by a threat to take petitioner's wife in custody.

His claim of protracted questioning while handcuffed finds no support in the evidence and is directly contrary to the finding of facts made by the Court (Record pp. 40-45). The Court found that although petitioner was at the State's Attorney's office from shortly after noon until about midnight, the questioning was never continuous or extended; there were delays, recesses and interruptions; the treatment accorded petitioner was considerate; he was at all times seated with his handcuffs released; at intervals in the afternoon and evening food, coffee and cigarettes were given to him; petitioner is highly intelligent; he had experienced previous arrests and interrogations by the police and was not adversely affected by the treatment accorded him on this occasion. When petitioner indicated his readiness to make a statement, an official Court Reporter was summoned and a stenographic record of the confession was made. Following this confession, the petitioner was not again questioned until late the following afternoon, some seventeen hours later, when he appeared before the Coroner at a formal inquest. On this occasion the entire interrogation was concluded within one and one-half hours. (Record pp. 43-44). Thus, it is seen that petitioner's entire argument on this point is based upon an assumption of facts diametrically opposed to those found by the Court. His argument accordingly must fall, for it is only on uncontroverted facts that the issue of Federal due process is to be considered. *Gallegos* vs. *Nebraska*, supra at p. 62.

Similarly, petitioner's claim that a "threat to take his wife into custody" coerced his first confession is also a departure from the facts found by the Court. The announced purpose of the officers was merely to question his wife as to any knowledge she might have bearing upon the murder (Record p. 40). This can hardly

be classed as a threat or as such a threat as would coerce a confession or render it involuntary. Just as the hope of benefit influencing a confession so as to render it involuntary must relate to the particular crime confessed, so also a threat must have a direct and immediate relation in order to invalidate the confession. Cf. *Henson* vs. *State*, 159 Tex. Cr. 647, 652; 266 S.W. 2d, 864 (1953), *State* vs. *Beard*, 16 N. J. 50, 56; 106 A 2d 265 (1954).

The Court properly found that this pretense of placing a telephone call for the wife had such collateral and remote connection as not to taint the confession with a probability of untruth (Record p. 41) (Cf. *State* vs. *Malm*, 142 Conn. 118, 121. And in any event Connecticut courts hold that a trick which has no tendency to produce a confession except one in accordance with truth is always admissible. *State* vs. *Palko*, 121 Conn. 669, 680.

Alone or together, neither illegal detention nor deceit by the police would suffice to vitiate a confession as unconstitutionally obtained. *U. S. ex rel. Caminito* vs. *Murphy*, 222 F. 2d 698, 700 (1955).

We submit that the interrogation of petitioner under these circumstances was at all times within reasonable limits. It was wholly free from those objectionable features usually referred to as third degree methods. Throughout there was a complete absence of conduct calculated to overpower petitioner's resistance. Accordingly, the Court below quite properly found that there was neither physical nor psychological coercion. *Stein* vs. *N. Y.*, 346 U. S. 156, 184 (1951). Where there is a dispute as to whether the facts which are charged to be coercive actually occurred, or where different inferences may be drawn from the admitted facts, the appellant tribunal is not to interfere even though it might on an original appraisal have come to a contrary conclusion.

Lyons vs. *Okla.*, 332 U. S. 596, 602 (1944).
Lisenba vs. *Calif.*, supra at p. 238.

Although petitioner makes no claim that any of these elements of prolonged interrogation, of being handcuffed, or of threats to summon his wife, actually attended his confession to the Coroner, he takes a position that these occurrences of the preceding day

carried over and infected his second confession also. However, since the Court found that these elements were not present on the day of the first confession, they obviously could have had no effect upon the second confession. And in any event a confession otherwise voluntary is not affected by the fact that a previous one was obtained by improper influences, if it is shown that those influences were not operating when the later confession was made. *State* vs. *Willis*, 71 Conn. 293, 313. *Lyons* vs. *Oklahoma*, supra at p. 603. The burden of showing essential unfairness in a state court is upon him who claims such injustice and seeks to have the result set aside, and this burden must be sustained not as a matter of speculation but as demonstrable reality. *Adams* vs. *U. S. ex rel. McCann*, 317 U. S. 269, 281 (1942). Petitioner here has failed utterly to sustain this burden.

III

THERE WAS NO DENIAL OF COUNSEL TO PETITIONER

The short answer to this claim is that there was no refusal of counsel to petitioner. The Trial Court specifically found that petitioner at no time requested counsel before or during his confession to the police (Record p. 41). Moreover on the day following this first confession, petitioner made no request that his attorney be called to the jail. Opinion below, 143 Conn. 167, 174. (Petitioner's Appendix A, p. 24.) That he had no desire for counsel is further demonstrated in his confession to the Coroner. There, at the very outset of the interrogation, he expressly elected to proceed without counsel notwithstanding that he was specifically instructed as to his right to counsel as well as his right to refuse to testify altogether (Record p. 44).

Even if these were not the facts, the denial of counsel during interrogation by police or coroner would not constitute a violation of due process. *Stroble* vs. *California*, 343 U. S. 181, 196 (1952). See also *State* vs. *Cross*, 72 Conn. 722, 728. This Court has repeatedly held that the Fourteenth Amendment does not bind state courts to exclude a confession because, without coer-

cion, it was obtained while prisoner was uncounselled and illegally detained. *Stein* vs. *N. Y.*, supra at p. 188. *Lisenba* vs. *California*, supra at p. 240.

The test of admissibility is whether the confession was voluntary and not whether the accused was well advised. *State* vs. *Palko*, supra at p. 680. Obviously, a confession is not rendered involuntarily merely by reason of the absence of counsel. Particularly where a defendant has had considerable prior experience with criminal investigations, as is true of this petitioner, the denial of counsel and confession while held incommunicado does not work fundamental unfairness. *Boyden* vs. *Webb*, 207 F 2d 201, 204 (1953).

The right to counsel which petitioner herein asserts so vehemently is one which arises only upon the arraignment of prisoner. *Hawk* vs. *Olson*, 326 U. S. 271, 278 (1945). Lack of counsel prior to trial does not constitute a denial of justice. *Gallegos* vs. *Nebraska*, supra at p. 65. No claim is made here that there was any interference with petitioner's right to counsel at all times subsequent to the Coroner's hearing on January 31st so that ample opportunity for consultation and preparation was available to petitioner as specified in *Powell* vs. *Alabama*, 287 U. S. 45, 59 (1932).

IV

AS TO ILLEGAL DETENTION

It should be noted that at the time of making both his confessions, petitioner was being held on lawful process relating to other charges. Upon receiving the ballistics report, the investigators concededly might have questioned him at the Jail. Instead, they procured his delivery to the State's Attorney's office on written request to the Jailer rather than by court order. As to his confession to the Coroner the following day, petitioner's presence could have been procured by subpoena. *State* vs. *Buteau*, 136 Conn. 113, 121. Instead, his appearance was produced by a telephone call from the Coroner to the Jailer.

Since petitioner was wholly unaware of the method used to present him on either of these occasions, the irregularity obviously had no impact on him and his confessions cannot be deemed to be tainted thereby (Record pp. 42, 44). Yet petitioner contends that because his removal to the State's Attorney's office was without specific court authorization and because the Coroner dispensed with a formal subpoena, his confessions thereby become involuntary as a matter of law quite apart from whether they were involuntary as a matter of fact.

Petitioner concedes that the McNabb rule has no application in State courts; but even in Federal jurisdictions where it does apply, the McNabb doctrine does not preclude police examination of a prisoner lawfully arrested and held on other charges.

Palakiko vs. *Harper, Warden*, 209 F 2d 75, 94 (C. A. 9, 1953) cert. den. 347 U. S. 956, 979 (1953).

U. S. vs. *Carignan*, 342 U. S. 36, 45 (1951).

In both the Palakiko and Carignan cases the prisoners were removed from jail, without court order, for questioning which resulted in confessions. This Court there pointed out that constitutional requirements do not forbid such private examination of persons in lawful custody. *U. S.* vs. *Carignan*, supra at 39.

Particularly with a prisoner experienced in the ways of crime and its detection, as was this petitioner, it is difficult to see how interrogation at the jail or his removal by court order or subpoena would have made any difference. The places in which the confessions were given or the means by which he was brought to those places had nothing whatever to do with the giving of the confessions. *Palakiko* vs. *Harper, Warden*, supra at 94.

Under the law of Connecticut, a voluntary confession is not to be excluded because of any illegality in the accused's situation at the time of making it, and a confession if otherwise admissible, cannot be rejected for the reason that the accused was in custody on invalid process or without any process or legal right.

State vs. *Zukauskas*, 132 Conn. 450, 458.

State vs. *Buteau*, 136 Conn. 113, 123.

State vs. *Guastamacchio*, 137 Conn. 179, 183.

This Court, too, recognizes that evidence obtained by illegal means may not void state convictions and the Fourteenth Amendment does not prohibit a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive. *Stein* vs. *N. Y.*, supra at 192. This is not one of the cases where the "sphere of superintendence (of this Court) should . . . extend to state police activities." *U. S.* vs. *Murphy*, supra at p. 706.

CONCLUSION

This petition for certiorari does not present sufficient substance or merit to warrant review by this Court. There was no denial of due process of law in the procuring or use of petitioner's confessions.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari ought to be denied.

Dated May 10, 1956.

ABRAHAM S. ULLMAN,
ARTHUR T. GORMAN,
Counsel for Respondent.

RESPONDENT'S EXHIBIT AA FOR IDENTIFICATION

The

SUPREME COURT OF ERRORS

of the

STATE OF CONNECTICUT

NEW HAVEN COUNTY

NOVEMBER TERM, 1954

4082

STATE OF CONNECTICUT	Superior Court,
vs.	New Haven County,
HAROLD D. ROGERS.	May 25, 1954.

APPEARANCES.

For the Plaintiff:
ABRAHAM S. ULLMAN, State's Attorney.

For the Defendant:
THOMAS R. ROBINSON, Esq.

DEFENDANT'S APPEAL FROM THE SUPERIOR COURT FOR NEW HAVEN COUNTY.

HON. SAMUEL MELLITZ, Judge and a jury.

STATE OF CONNECTICUT
COUNTY OF NEW HAVEN } ss.

To the Honorable Superior Court, having criminal jurisdiction, holden at New Haven, within and for the County of New Haven, on the 1st Tuesday of January, A. D. 1954, and now in session:

First Count.

The Grand Jurors, within and for the County of New Haven, upon their oaths, accuse Harold D. Rogers, of the Town of New Haven, in said County, of the crime of Murder in the First Degree, and charge that at the Town of West Haven, in said County, on the 21st day of November, A. D. 1953, the said Harold D. Rogers did in perpetrating a Robbery murder one Dorothy Kennedy by shooting her, the said Dorothy Kennedy, all in violation of Sectionu 8350 of the General Statutes of Connecticut as amended.

Second Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, further accuse the said Harold D. Rogers of the crime of Murder in the First Degree, and charge that at the Town of West Haven, in said County, on the 21st day of November, A. D. 1953, the said Harold D. Rogers did shoot the said Dorothy Kennedy; in consequence of which shooting the said Dorothy Kennedy did die on said 21st day of November, A. D. 1953, and said murder was done wilfully, deliberately and premediately, all in violation of Section 8350 of the General Statutes of Connecticut as amended.

A true bill,
FRANK T. HEALEY,
Foreman.

[March 2, 1954, at 3:16 P. M.]

To the Sheriff of New Haven County, his Deputy, or either of the Constables of the town of West Haven, or either of the

Policemen of the City, Town of West Haven within said County, or either of the State Policemen of the State of Connecticut—Greeting:

By authority of the State of Connecticut, you are hereby commanded to arrest the body of the above named Harold D. Rogers and him forthwith have before the Superior Court now in session at New Haven, within and for the New Haven County, then and there to answer to the charges alleged against him in the foregoing Indictment of the Grand Jury within and for New Haven County, and be dealt with thereon as the law directs. Hereof fail not, but of this warrant due service and return make according to law.

Dated at New Haven, Connecticut, this 2nd day of March, A. D. 1954.

By order of the Court,

FRANK C. MINNIX,
Asst. Clerk.

MOTION FOR CHANGE OF VENUE.

The defendant in the above-entitled action represents:

1. There has been extensive publicity in newspapers and on the radio throughout the County of New Haven and its neighborhood concerning this prosecution, and the claims with respect thereto made by the State. In addition to other matters, there has been particularly widespread dissemination of an announcement by the State's Attorney for this County that the accused had allegedly confessed his guilt.

2. In view of said publicity and its impact upon the residents of this County there is widespread opinion as to the defendant's guilt or innocence among the citizens of said County.

3. Under the foregoing circumstances it would be impossible for the defendant to obtain a fair trial by jury in New Haven County, and to try him there would be in violation of Article First Section 9 of the Constitution of the State of Connecticut, and of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, The defendant respectfully moves that a change of venue be ordered under the provisions of Section 8794 of the General Statutes.

The Defendant,
By THOMAS R. ROBINSON,
CHESTER T. CORSE,
His Attorneys.

[Filed April 23, 1954.]

[Denied April 28, 1954 (MELLITZ, J.)]

MOTION FOR CHANGE OF VENUE.

The defendant in the above entitled action respectfully represents:

1. Since his previous Motion for a Change of Venue there have been additional publications in the newspapers concerning the above entitled case and more particularly concerning the State's Attorney's announcement of his alleged "confession."

2. Said additional publications have greatly increased the probability that it will be impossible to obtain jurors in this County who are unaware of the State's claim.

3. The defendant submits that it is humanly impossible for a juror to completely discard from his mind his awareness of said claim and such awareness cannot but influence his verdict.

4. Such a situation cannot be cured on voir dire since any questions devoted to a panelist's attitude cannot but make him aware of the State's claim even if, as is most unlikely he is not already aware of it.

Wherefore, the defendant respectfully renews his Motion for a Change of Venue.

The Defendant,
By THOMAS R. ROBINSON,
CHESTER T. CORSE,
His Attorneys.

[Filed Apr. 29, 1954.]

[Denied Apr. 29, 1954, by MELLITZ, J., in open court.]

[Verdict of guilty of murder in first degree in perpetrating a robbery returned by the jury at 5:05 P. M., May 19, 1954.]

MOTION TO SET ASIDE VERDICT.

The defendant in the above entitled case respectfully moves that the verdict of guilty rendered against him on May 19, 1954, be set aside and as reasons therefor alleges that said verdict is against the weight of the evidence and contrary to the law.

The Defendant,
By THOMAS R. ROBINSON,
CHESTER T. CORSE,
His Attorneys.

[Filed May 20, 1954.]

ORDER.

May 25, 1954.

The foregoing motion having been presented to the Court, hearing had thereon, and it appearing that the same should not be granted, it is hereby

Ordered, That the verdict of guilty entered in the above entitled action be and hereby is not set aside.

By the Court, (MELLITZ, J.).
FRANK C. MINNIX,
Ass't Clerk.

STATE OF CONNECTICUT	Superior Court,
vs.	New Haven, County,
HAROLD D. ROGERS, of New Haven.	May 25th, 1954.

Present, HON. SAMUEL MELLITZ, Judge.

JUDGMENT.

Upon an indictment laid before the Grand Jurors of said New Haven County, duly impanelled and sworn by Abraham S. Ullman, Esquire, Attorney for the State within and for said

County, charging said Harold D. Rogers, of the Town of New Haven, in said County, with the crimes of Murder in the First Degree in Perpetrating a Robbery and Murder in the First Degree, and returned to this Court (QUINLAN, J.) by the Grand Jurors on March 2nd, 1954, and endorsed a true bill as by said bill of indictment, as on file, will more fully appear, the prisoner appeared before this Court, at its September Term, 1953, Winter Session, thereof, on March 4th, 1954, and for plea said not guilty to each count of said indictment; and elected to be tried by a Jury of 12 on each count, and thence to April 23rd, 1954 when the aforesaid Harold D. Rogers, by his counsel, filed a motion for a change of venue and a motion that the State be ordered to elect upon which count of said indictment the State would elect to proceed, and thence to April 28th, 1954, when the Court denied the aforesaid motion for a change of venue and denied without prejudice the defendant's motion for an order of election as to counts, and thence to April 29th, 1954 when the defendant, by his counsel, filed a motion for a change of venue, which motion the Court denied; and thence to May 18th, 1954 when the defendant, by his counsel, made oral motion that the State elect which count it would proceed on, and the State's Attorney orally, in open Court, made election to proceed on the 1st count charging Murder in the First Degree in Perpetrating a Robbery only; and thence to May 19th, 1954 when after a full hearing the case was committed to the Jury who returned at 5:05 P. M. a verdict of Guilty of Murder in the First Degree in Perpetrating a Robbery, which verdict the Court accepted and ordered recorded, and when the defendant, by his counsel, made oral motion that sentence of said prisoner be deferred, which motion the Court granted and remanded the prisoner to the custody of the Sheriff to be brought forth for sentence on May 25th, 1954, and thence to May 20th, 1954 when the prisoner, by his counsel, filed a motion to set aside verdict at 10:01 A. M., and thence to the present time when the Court denied said motion.

Wherefore ~~it is adjudged that~~ the said Harold D. Rogers be remanded to the custody of the Sheriff of this County, to be conveyed by him or other proper authority, within the next twenty

days to the Connecticut State Prison at Wethersfield and to be safely kept until the 22nd day of November, 1954, whereupon the punishment of death shall be inflicted upon the said prisoner, Harold D. Rogers, the execution of this sentence to be in accordance with the provisions of the statutes of this State, and that a warrant issue accordingly.

By the Court,
FRANK C. MINNIX,
Assistant Clerk

DEFENDANT'S APPEAL.

In the above entitled action the defendant appeals to the Supreme Court of Errors from the judgment rendered therein.

The Defendant
By THOMAS R. ROBINSON,
CHESTER T. CORSE,
His Attorneys

I certify the the foregoing appeal was filed on June 8, 1954 and that the defendant has paid the entry and record fees and the fee for the cognizance taken by me.

FRANK C. MINNIX,
Assistant Clerk of the Superior Court
for New Haven County.

FINDING.

[As amended by amendment to finding filed January 18, 1955.]

FIRST

Upon the trial of this case to the Jury, the State offered evidence to prove and claimed that it had proved the following facts:

1. For some time prior to November 21, 1953, the deceased Dorothy Kennedy together with her husband Joseph Kennedy had owned and operated a liquor store known as the West Shore Package Store at 143 Ocean Avenue in the Town of West Haven.

2. On the afternoon of November 21st the deceased worked with her husband in the store from about 2:10 P. M. until about 5:10 P. M. when she went to her home for supper, returning to the store at approximately 6:08 P. M.

3. Shortly after 7 P. M. Joseph Kennedy left the deceased in charge of the store and went home for his supper.

4. At about 7:20 P. M. and again at 7:30 P. M. neighbors observed the deceased alone in the store reading a newspaper.

5. For some time prior to November 21, 1953, the accused knew that his nephew George Evans kept a 38 calibre Smith & Wesson revolver and cartridges in a night table in the bedroom of the nephew's home.

6. Some time on November 21st the accused decided to procure money by means of a robbery and accordingly he went to his nephew's home to get the revolver.

7. While at his nephew's home the accused without the knowledge of anyone present went to the bedroom and removed the revolver from its holster and eight cartridges from a box of cartridges.

8. On leaving his nephew's home, the accused got into his car and there loaded six cartridges into the gun.

9. Shortly after 6 P. M. on that date the accused purchased a half-pint of whiskey in a liquor store on Oak Street in New Haven and then consumed a portion of it.

10. The accused then drove to West Haven and parked his automobile opposite the West Shore Package Store, arriving there about 7:40 P. M.

11. The accused entered the store and, after asking the deceased for a half-pint of liquor, produced his gun and indicated his purpose of committing a robbery.

12. The deceased ran to the telephone to call for help whereupon the accused followed her behind the counter and struck her

on the head several times with the butt end of the gun in order to prevent her from using the telephone.

13. The accused then fired five shots at the deceased, two of which struck her, one causing superficial wounds in her thigh and the other traversing both lungs and producing the injuries which resulted in almost immediate death.

14. After firing the shots the accused removed the cash amounting to about $60 from the cash register and drove off.

15. Four of the five bullets fired by the accused were recovered and turned over to the State Police Laboratory.

16. On this same night of November 21st George Evans discovered his revolver was missing from the night table in his room and immediately made efforts to contact the accused to interrogate him about it.

17. On being confronted by his nephew the following day, the accused steadfastly denied taking the gun whereupon Evans accompanied by the accused went to Police Headquarters and reported that the gun had been stolen.

18. The accused thereafter kept the gun in his possession but endeavored to conceal its identity by filing off the serial numbers.

19. On January 9, 1954, the New Haven Police were seeking the arrest of the accused on charges of Attempted Robbery, Breaking and Entering and Theft committed that day at the Travelers Hotel.

20. On the evening of January 9th officers located the accused sitting in his car on Oak Street, New Haven, with the Evans revolver in his lap.

21. As the officers approached his car with drawn guns, the accused tried to hide the revolver under the seat.

22. On being questioned by police that evening the accused stated he had won the gun in a "crap game" that afternoon but in further questioning on the following day he admitted stealing it from the home of George Evans.

23. On January 13, 1954, the accused was by the New Haven City Court bound over to the April Session of the Superior Court on charges arising out of his arrest on January 9, 1954, and was lodged in the New Haven County Jail under a duly issued mittimus.

24. On the morning of January 30th County Detective Holtz delivered the revolver found in the possession of the accused to the State Police for testing and thereupon ascertained that it had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

25. Thereupon the accused was brought to the State's Attorney's Office and on that evening in the presence of an Official Court Reporter gave a statement, Exhibit VV, wherein he admitted killing the deceased.

26. At the Coroner's Inquest the following day the accused under oath made a further statement, Exhibit WW, admitting that he had killed the deceased.

27. The statements referred to in Paragraph 25 and Paragraph 26 were free and voluntary statements.

28. The truth of these statements insofar as it relates to the killing of the deceased by the accused, was not disputed by any witnesses during the trial.

SECOND

Upon the trial of this case to the jury the accused offered evidence to prove and claimed that he had proved the following facts:

29. On or before January 30, 1954, he was confined in New Haven County Jail under a duly issued mittimus from the City Court of New Haven binding him over to the Spring Session of the Superior Court. He had retained counsel to appear for him in the City Court and Superior Court for these proceedings. Said counsel appeared for him when he pleaded not guilty and waived examination, and the appearance of said counsel was a matter of record in the proceeding.

30. Shortly after noon on January 30, 1954, on the purported authority of a letter from the State Attorney's office, Exhibit 4, he was delivered by the keeper of the New Haven County Jail to detectives and transported to the State's Attorney's Office in the Court House.

31. Shortly after his arrival at the State's Attorney's office, he asked for his attorney above referred to, but was not then or at any time that day permitted to see counsel, nor was counsel informed of the interrogation in progress.

32. From his arrival at the State's Attorney's office until the early hours of the following morning he was questioned about the death of Dorothy Kennedy.

33. At approximately 8:00 P. M. on January 30, 1954, Asst. Chief Raymond Eagan of the New Haven Police Department was summoned to the State's Attorney's Office and took over the questioning of the accused.

34. Upon his arrival, Chief Eagan was informed that Rogers had consistently denied being involved in any way in the death of Mrs. Kennedy.

35. Chief Eagan then told Rogers that unless he confessed it would be necessary to bring Rogers' wife downtown for questioning and to send the children of whom she was in charge to the Children's Building.

36. In connection with the threat, Chief Eagan pretended to make a telephone call directing that Mrs. Rogers be picked up, but that action was postponed for one hour.

37. On January 30, 1954, Mrs. Rogers, the wife of the accused, was ill and suffering from arthritis.

38. At the end of one hour, Chief Eagan told Rogers that he would have to call Mrs. Rogers, and picked up the telephone as though to give such direction.

39. At that point, Rogers gave an oral statement to Chief Eagan, a court stenographer was summoned and a written statement was taken, Exhibt VV.

40. Prior to Chief Eagan's threat to pick up Mrs. Rogers, the accused had denied any involvement in Mrs. Kennedy's death.

41. In the early hours of the morning of January 31, 1954, the accused was returned to New Haven County Jail.

42. Sometime between midnight January 30, 1954, and 11:00 A. M. January 31, 1954, James J. Corrigan, Coroner of New Haven County, was informed that Rogers had given a statement.

43. Sometime on the morning of January 31, 1954, the Coroner spoke to the Sheriff of New Haven County, either in person or by telephone, and instructed him to hold the accused "incommunicado" and not permit him to see counsel.

44. Between 11:00 A. M. and 12 noon on January 31, 1954, Attorney Chester T. Corse, representing the accused, came to the jail and demanded to see Rogers.

45. Upon receipt of Attorney Corse's request, the Sheriff of New Haven County telephoned the State's Attorney and was told that Mr. Corse could not be permitted to see the accused.

46. At about noon on January 31, 1954, two officers of the New Haven Police Department arrived at the New Haven County Jail and were, over Mr. Corse's objection, and without further instructions from the Coroner or the State's Attorney, permitted to see Rogers.

47. At this time, the accused was held at the New Haven County Jail under authority of the City Court mittimus, Exhibit 3, and the Coroner's Warrant, Exhibit 7, was not lodged at the jail until later in the afternoon of January 31, 1954.

48. At sometime late in the afternoon of January 31, 1954, upon oral instructions from the Coroner, the accused was taken by the sheriff of New Haven County to the County Court House where proceedings were had before the Coroner as appears in Exhibit WW.

49. Neither Mr. Corse nor any other counsel for the accused was notified of said proceedings.

50. No explanation of the accused's right other than what appears in Exhibit WW was given him by the Coroner or by any other person.

51. The statements given by the accused in Exhibits VV and WW were so tainted by lack of due process of law as to be involuntary.

THIRD

The accused requested in writing the Court to charge as follows:

52. In determining what weight you should give to the confessions of the accused, you must determine whether they were given voluntarily and if you find that they were in any respect involuntary you may disregard all or any part of them. In determining their voluntariness and the weight that you should give to them, you may take into account the following factors:

(a) The transportation of the accused to the office of the State's Attorney on January 30, 1954, was illegal and improper.

General Statutes, Sec. 8727.

(b) The transportation of the accused to the Coroner's hearing on January 31, 1954, was illegal and improper.

General Statutes, Sec. 485.

(c) The administering by the Coroner to the accused of the oath to tell "the truth, the *whole* truth, and nothing but the truth" prior to warning him that he need say nothing was illegal and improper.

U. S. Constitution, Amendment XIV.
Conn. Constitution, Article I, Sec. 9.

(d) The accused has an absolute right to have counsel actually present with him at any hearing before the Coroner. He may waive this right, but, if you find that the warning given him, "it is also that you are entitled to be represented by counsel if you wish to," did not adequately apprise him of this right, you may disregard the statement given to the Coroner.

General Statutes, Sec. 477.

(e) If you find the accused, as a result of having taken the oath or for any other reason, did not understand that he was not required to testify before the Coroner, you should disregard his statement there taken.

Conn. Constitution, Article I, Sec. 9.

(f) It was illegal and improper to deny the accused access to counsel, if you find that he was so denied, on January 30 and 31, 1954.

U. S. Constitution; Amendment IV.
Conn. Constitution, Article I, Sec. 9.

(g) If you find that the confession made in the State's Attorney's office on January 30, 1954, was induced by fear of reprisals against the wife of the accused, you should disregard it.

Turned v. *Pennsylvania*, 338 U. S. 682, 93 L. Ed. 1810.
See *State* v. *Gustamachio*, 37 Conn. 179.

53. In appraising the weight which you should give to the confessions you should consider the whole of each of them. You may disregard all or any part of them, but if you choose to disregard any part, I instruct you that you are not permitted to reach thereby a contrary conclusion unless you find that such contrary conclusion has been proved beyond a reasonable doubt.

22 C.J.S. p. 1478, Sec. 842, and cases cited.

54. In determining whether, if you find the accused guilty of murder in the first degree, you should recommend life imprisonment, you should take into account not only the circumstances of this crime, but the general character and condition of the accused as it appears in the evidence, and the burden of proof on this subject, as on every other matter of fact to be proved to you, is upon the State.

Gen Stat. Conn. Suppl. 1953, Sec. 2463c.

FOURTH

The Court charged the jury and exceptions were taken as follows:

55. Some of the evidence in the case, ladies and gentlemen, consists of confessions or admissions of the accused Harold Rogers. His testimony before the Coroner was read into the record and listened to by you in full. It is in evidence and is marked as an exhibit. Then there is an exhibit in the case, a statement or confession made to the Assistant Chief of Police, Eagan, which was read to you by Mr. Ullman. You will recall that when the State offered these confessions in evidence you were excused while I considered the question of their admissibility. That I did hold these confessions were admissible you know. I want to caution you now, however, that this ruling on my part meant no more than that, in the performance of my duty, I concluded that the circumstances surrounding the making of those statements were such that you should have them before you for your consideration, and that my ruling is not to be taken by you as giving to those statements any more weight in your deliberations than you conclude they should have.

56. No confession or admission of an accused is admissible in evidence unless made freely and voluntarily and not under the influence of promises or threats. The fact that a confession was procured by the employment of some artifice or deception does not exclude the confession if it was not calculated, that is to say, if the artifice or deception was not calculated to procure an untrue statement. The motive of a person in confessing is of no importance provided the particular confession does not result from threats, fear or promises made by persons in actual or seeming authority. The object of evidence is to get at the truth, and a trick or device which has no tendency to produce a confession except one in accordance with the truth does not render the confession inadmissible, and so you will give these statements or confessions that you have before you whatever weight you consider they are entitled to you consider all of the circumstances under which they were procured so far as these circumstances

have been made known to you by the evidence. They include, among other things, the fact that the accused was in custody and under the control of the officers at the time; that he was kept in this status that has been described as incommunicado, and the other elements in the evidence before you; the manner in which he was taken from the jail to the State's Attorney's office and to the Coroner's office and what transpired on each of those occasions; the facts relating to what was said to him about his desire for counsel and everything else that you recall as being disclosed to you by the evidence, as to the circumstances under which the confessions and statements were made. All of the circumstances leading up to the making of these confessions, I say to you, are proper for you to consider in determining the weight that you are to give them. I want to repeat this. It is not wrongful for a police officer to question an accused person about an alleged crime. A confession made to a police officer is not inadmissible for that reason alone and a confession made by artifice, by trick or design, is not inadmissible for any one of those reasons alone. A confession made when a person is illegally detained is not inadmissible for that reason alone. The rules which surround the use of a confession, are designed and put into operation because of the desire expressed in the law that the confession, if used, be probably a true confession. The confessions of the accused which have been admitted as evidence are to be used by you in connection with all the other evidence in the case. Made, as they were, out of court, they are not like the sworn testimony offered before you here in court. They are to be considered by you as declarations inconsistent with the accused's plea of Not Guilty. They may, however, be evidence, circumstantial in nature, of the truth of the statements made in them. It is for you to determine what weight you are to give to them, and in that connection, as I have said, you should consider the circumstances under which they were made as the circumstances appear in evidence before you.

57. So it will be necessary for you to consider and decide, ladies and gentlemen, whether or not, if you find that the accused killed the deceased unlawfully, that he did it in perpetrating or

attempting to perpetrate a robbery. As I have said, if you find that to be so, then it is murder in the first degree. Then I must instruct you so that you may understand the elements of the crime of robbery.

58. Robbery consists of the taking of money or property from the person of another or from his presence when it was under his protection or control, against his will, by force or violence or by fear caused by the threat of force or violence, causing him to part with it from apprehension of personal danger. If, then, you find it proven beyond a reasonable doubt that the accused murdered this deceased while the accused was engaged in perpetrating or attempting to perpetrate a robbery, as I have defined that to you just now, the accused was guilty of first degree murder. I should say to you that it is not necessary, under the statute, that the robbery be actualy accomplished. If the murder is committed in the course of an unsuccessful attempt to rob, by the person making the attempt, the crime is still murder in the first degree. If there is proof of the accused's intention to steal from the person or presence of this deceased, by the use of a deadly weapon, whether its use was to put her in fear or to injure her, the act or endeavor was adapted as it was intended to effectuate the purpose though unsuccessful, and in such circumstances the crime of an attempt to commit robbery is established.

59. First degree murder, as charged in this indictment, is murder committed in perpetrating or attempting to perpetrate a robbery.

An unlawful homicide; without extenuating circumstances reducing it to manslaughter, would be murder in the second degree, unless the murder falls within one of the classes designated by the statute as murder in the first degree. Well now; this statute, I think was read to you by Mr. Robinson in the course of his argument. The statute says this: "All murder perpetrated by means of poison or by lying in wait or by any other kind of wilful, deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate any arson, rape, robbery or burglary, or injury to any person or property by means of any

explosive compound, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree."

That is the way the statute reads. So far as this case is concerned, the essence of the statute which you will be called upon to consider, lies in the phrase "committed in perpetrating or attempting to perpetrate any robbery."

Proof of second degree murder, as I have indicated, requires proof of the elements I have already indicated, namely the killing, the unlawfulness of the killing, and malice, express or implied. If, in addition to those elements the State also proves that the killing was committed in the perpetration or in the attempt to perpetrate a robbery, as alleged in the indictment, it becomes, by force of the statute, murder in the first degree. Well now, in this connection I may say to you that a man may go out with intent to commit a robbery but without the intent of injuring anybody. In this frame of mind he enters a place, and in committing or attempting to commit the robbery, he kills a person. That killing would be murder, even though there was no ill-will, hatred or malevolence toward the person killed, because the evil intent to commit the robbery carries over to make the crime murder in the first degree. If a killing occurs in the perpetration or attempting to perpetrate a robbery, it is not only murder, but, by virtue of the statute murder in the first degree, and that is true even though the killing itself was accidental.

So it will be necessary for you to consider and decide, ladies and gentlemen, whether or not, if you find that the accused killed the deceased unlawfully, that he did it in perpetrating or attempting to perpetrate a robbery. As I have said, if you find that to be so, then it is murder in the first degree.

Exceptions were taken as follows:

60. Mr. Corse. If the Court please, we would most respectfully except to that part of your Honor's charge in which your Honor said that no confession was admissible unless voluntary; not because that is a mis-statement, but because, unless it was further explained, that the jury also had a right to determine,

in deciding how much weight should be given to the confession, the voluntariness, as produced by the evidence presented to the jury. Your Honor's charge, as it was given, might have given them and probably did give them the impression that your Honor, having once admitted the confession, that they were bound by your Honor's ruling that the confessions were voluntary.

61. We would also most respectfully except to your Honor's charge, to that part of your Honor's charge in which your Honor explained the crime of robbery, in that your Honor omitted to define the crime of theft, which is an integral part of the crime of robbery.

62. Also, if your Honor please, in regard to that portion of your charge, near the end, your Honor charged the jury that they could find under this indictment, the accused guilty of first degree murder if they should find that the murder was committed in the perpetration or in the attempted perpetration of a robbery. My memory of the indictment, I believe I am correct, that there is no mention of attempted perpetration and we would therefore except to your Honor's including the attempted perpetration in that statement.

FIFTH

The following rulings were made on the trial:

63. Detective Ruggiero had testified that in talking with the accused on the morning following his arrest, the accused stated he had taken this gun from his nephew's home at 7 o'clock in the evening of November 20th.

Mrs. Vera Evans, a witness called by the State, testified that she was a niece by marriage of the accused, and that the accused had come to her home for a short time shortly after 1:00 P. M. on November 21, 1953, and upon further examination by the State's Attorney, the following occurred:

Q. Did you ever say that it was at two o'clock? A. Well, I did make a mistake.

Q. What? A. And I corrected it with Mr. Flanagan. Detective Flanagan and I told him that I had made a mistake of the time, because I was all excited at the time he came and that my neighbor told me it was at that time, because we were all there with the children. There was nobody in the house but us.

Q. But you do remember—telling Mr. Flanagan first, that your uncle came there along about two o'clock?

Mr. ROBINSON. I object to this. This is cross-examination of the witness, the gentleman's own witness and impeaching the—

The COURT. I don't think it is that at all. All he is doing at the moment is recapitulating the answer that this witness just gave. I think it is not offensive. I will allow it and overrule the objection.

Mr. ROBINSON. Have an exception?

The COURT. Exception may be noted.

Mr. ULLMAN. May the question be read?

(Question read.)

Q. You remember that, don't you? A. I did tell him. That was my mistake. I did tell him the time.

Q. Do you remember telling him that on the first time you talked to Mr. Flanagan?

Mr. ROBINSON. I renew my objection to this question also, because obviously it is along the same line, cross-examination of this witness.

The COURT. It isn't cross-examination.

Mr. ULLMAN. It isn't cross-examination.

The COURT. I will allow it.

Mr. ROBINSON. Have an exception?

The COURT. She apparently says she can't remember and all I can see that he is doing is endeavoring, if he can, to refresh her recollection.

Mr. ROBINSON. May I have an exception?

The COURT. Exception may be noted.

Mr. ULLMAN. Now, may the question be read?

The COURT. Yes.

(Question read.)

The WITNESS. The second time that he came to the house.

Q. Very well. You remember telling Mr. Flanagan the time that your uncle left, after having told him that he arrived at five? A. I said he stayed there a short time.

Q. Do you remember telling the time your uncle left the house? A. No, I don't remember telling him the time.

Q. Do you remember telling him that he left between five thirty and six P. M.?

Mr. ROBINSON. I object to that for the same reason.

Q. Do you remember that?

Mr. ROBINSON. I don't want to be always on my feet while this line is being pursued, but it certainly is only admissible on the basis of cross-examination after the witness has shown no—no hostility and no surprise, and until it appears I doubt very much that it is proper to allow the witness to be cross-examined.

Mr. ULLMAN. I don't consider that this is cross-examination.

The COURT. Overrule the objection.

Mr. ROBINSON. Exception.

The COURT. Exception may be noted. Read the last question, Mr. Whay.

(Last question read.)

The WITNESS. Yes, I remember telling him that.

Q. And do you remember signing a statement? A. Well, I signed a statement but that the time I didn't—remember the correct time that he was there and he had left.

Q. Did you sign a statement stating some time as to when he arrived and when he left? A. Yes.

Q. You did?

Mr. ROBINSON. I object to this because it is obviously not trying to refresh the recollection of the witness at all.

The COURT. All he asked her, she said that she signed a statement.

Mr. ROBINSON. True, but the only purpose of a witness signing a statement where apparently the examiner is not satisfied with the answer is to lay the foundation as a problem on cross-examination to impeach her testimony.

The COURT. Do you object to it, Mr. Robinson?

Mr. ROBINSON. I object to it.

The COURT. I will overrule it and note an exception.

Mr. ROBINSON. Exception.

Thereafter, on redirect examination by the State's Attorney the following occurred:

Q. Is your memory any better now, Mrs. Evans, than it was along about the 31st of January, 1954?

Mr. ROBINSON. Object to that. Obviously cross-examination.

The COURT. It is not cross-examination. I will allow it.

Mr. ROBINSON. Have an exception?

The COURT. Overrule the objection. Exception may be noted. Read the question Mr. Whay.

(Question read.)

A. Yes, sir.

Q. What do you think—I am trying to find out—when do you think, now, your memory is better for events that happened on the 21st of November—

Mr. ROBINSON. I object to that.

Q. Along about the 31st of January or now?

Mr. ROBINSON. That is certainly cross-examination of this witness.

The COURT. I will allow it. Overrule the objection.

Mr. ROBINSON. Have an exception?

The COURT. Exception may be noted.

Q. Do you know what the question is? A. May it be read please?

The COURT. Read it, please.

(Question read.)

A. My memory is the same as it was before, the only thing that I had made a mistake on the time.

Thereafter, the State's Attorney in his opening argument referred to this matter as follows:

What, in the meantime, was this accused doing. We know that sometime that afternoon he went to the home of his nephew, his nephew whom he knew owned a gun, with cartridges and bullets for it. He went there that afternoon. His niece said, on

the stand, that he was there, I think sometime between one and two o'clock, but she does admit that she had made an earlier statement that he was there along about five or five-thirty. At any rate, that was in an earlier statement. But at any rate, he goes there and goes upstairs and takes the gun from the night-table where it was kept for safekeeping. He takes the gun and takes eight cartridges from a box of fifty. He leaves behind the holster, because that could not serve him for any purpose whatsoever. He wanted only the gun and cartridges sufficient for his purpose, and as soon as he goes out he gets into his car in front of the Evans' home, and loads the gun. That, ladies and gentlemen, is the evidence that appears from his statement. Directly after getting possession of it, he loads it, and it is our claim, ladies and gentlemen, that that was along about six o'clock, or shortly before. I say, ladies and gentlemen, if it had been at one or two o'clock, as claimed, apparently, by the defense, that you would have had here in evidence some witnesses who would say that, "He worked for me that Saturday afternoon" or "He was in my company that Saturday afternoon," but not having any such evidence, I think that the conclusion is irresistable that he appropriated that gun at five-thirty that afternoon. Counsel for the accused have been loyal and diligent in the preparation of this case and had apparently investigated, checking into witnesses and obtaining witnesses, but do we have any witness whatsoever to show that the accused, on the afternoon of November 21, was engaged in any honest or legitimate activity? I say, ladies and gentlemen, that he conceived the purpose of committing this robbery sometime Saturday afternoon, and he went ahead and put his plans, his intentions, into execution, first getting the gun and cartridges, stripping it of the holster so that he could use it when necessary, gets into the car and loads the gun. And then what does he do? The next step that you would expect of a criminal intent on committing his crime. He goes down to Oak Street and fortifies himself with liquor; buys liquor on Oak Street, according to his own statement, and there, fortified by the gun and fortified by the liquor, he goes out to the Town of West Haven to this package store. No delay. A singleness of purpose which

is rarely found in any crime. Not to be delayed, not to be deterred, to go ahead and just commit this crime which he had determined upon, with all the deliberation and preparation in the case—I have never seen more—and he goes into that store, passed it by first, awaiting the time when the coast became clear, but then, when he sees it is in charge of just one person, a woman, too, ladies and gentlemen, that he can go ahead and accomplish his purpose successfully, and so he enters that store sometime, shortly before 7:45, and as he enters the store you can readily picture and conceive what reaction Mrs. Kennedy had.

Thereafter, the State's Attorney in his final argument referred to this matter as follows:

This crime, as I said before, was long planned over a period of at least several hours. He goes to his nephew's house. What for? To get the gun. He goes upstairs to the bedroom and takes it from out of its hiding place. He removes the holster to strip for action. He takes eight cartridges. He goes outside and immediately loads the gun. He goes down almost directly to procure a pint or half pint of liquor, and thus fortified, outside as well as within, he goes down to the appointed scene of this crime.

And note, too, the direct action, the practically direct action that takes him from the scene where he acquires the gun down to the scene where he comits the crime.

64. Raymond J. Eagan, a witness called by the State, identified himself as Assistant Chief of the New Haven Police Department, and thereafter, the following occurred:

Q. And on that day, sometime during that day, did you see the accused, Harold Rogers? A. I did.

Q. Where did you see him? A. In your office. That is eight o'clock at night.

Q. About eight o'clock at night.

Mr. Corse. Please the Court, I think the jury should be excused before we go further at this point.

Mr. Ullman. Well, this is a little premature. I would say, in about two or three more questions.

Mr. CORSE. Two or three questions. A little bit of what I am afraid of, Mr. Ullman.

Mr. ULLMAN. Well, I see no—

The COURT. Go ahead.

Mr. CORSE. Have an exception, your Honor?

The COURT. Certainly. Overrule the objection. Exception may be noted.

Q. And were there other officers present? A. There were.

Q. At the time? A. Yes, sir.

Q. And did you talk to Rogers? A. I did.

Q. Did he talk to you? A. He did.

Q. And at some time or other, did he make some statements to you? A. He did.

Q. With respect to the death of Mrs. Dorothy Kennedy— A. He did.

Q. In West Haven? A. He did, sir.

Q. He did. And were those statements taken down in shorthand? A. They were.

Q. By an official court reporter? A. Yes, sir.

Q. And later transcribed? A. Yes, sir.

Q. And did that statement consist of questions and answers? A. Yes, sir.

Q. Questions by you and answers by the accused? A. Yes, sir.

Q. I show you this transcript and ask you whether this is the record of the questions and answers that you have referred to? A. I would say that's it, sir.

Thereupon the Jury was excused and the Court heard evidence as to the admissibility of the statement. Thereafter the statement was admitted in evidence as Exhibit VV.

65. As part of its evidence in this case, after a preliminary hearing in the absence of the jury, the State offered a transcription of a statement given by the accused on the night of January 30, 1954. When the following occurred:

Mr. ULLMAN. Nothing further for the State. I offer this statement.

Mr. CORSE. I object to it.

The COURT. Overrule the objection. I'll allow it to be admitted.

Mr. CORSE. Would your Honor hear me briefly on it?

The COURT. Yes, go ahead. I thought you had nothing further to offer.

Mr. CORSE. I had no further evidence. I had specified that when I said that. Your Honor, I claim that this statement is inadmissible as a confession essentially on two grounds, the first being the long duration of the questioning period during which time he was, the evidence shows, kept handcuffed. There is no claim, of course, of any actual violence toward him, but he was kept handcuffed and was relentlessly questioned all during that period.

I cite to your Honor the case of Turner against Pennsylvania found at 338 United States Reports at page 62.

The COURT. What is that citation?

Mr. CORSE. Turner and Pennsylvania.

The COURT. What is the citation?

Mr. CORSE. 338 United States, 62, 93 Lawyers' Edition, 1810. It's a 1949 case in which there was questioning over a period of some days, in that case, during which the accused was not allowed to see friends or relations, nor was he informed of his right to remain silent until after he had begun to dictate his confession. In this case, so far as the evidence shows, he was never informed of that right.

The other point, may it please the Court, is the denial of the access to counsel. In connection with that, I would cite to your Honor the case of People against Stroble, which is the case in which the Supreme Court of the State of California—I don't have the California citation—the Pacific citation is 226 Pacific Second, at page 330. It was decided in 1951, and I call your Honor's attention to this passage which appears on page 337 of 226 Pacific Second. This, your Honor will perhaps realize, is the lower court version of the same case I cited to your Honor earlier in the matter of the change of venue, Stroble against California. The issue being discussed by the Court here is the fact that an attorney during the time the confession was obtained from the

accused, the first confession in this case, attempted to see the accused and was denied access to the accused. There was no evidence to show that the accused in this particular case had even asked for an attorney, but the attorney did represent him and attempted to see him. The court says: (reading)

In this case, if the Court please, there is no additional confession in existence at least none has been shown to be in existence, that is not tainted by this same defect, the denial of access to counsel in spite of the request.

I therefore object to the admission of the confession.

Mr. ROBINSON. Would your Honor pardon us a second?

Mr. CORSE. Mr. Robinson suggests, for the record, and I concur in his suggestion, that this claim is made under the 14th Amendment of the United States Constitution and under the provision of our State Constitution that prevents an accused being forced to testify against himself.

Mr. ULLMAN. I think it is of some significance, your Honor please, that counsel has failed to cite a single Connecticut case to support his position, although this point has been ruled upon a number of times by our Supreme Court. I think that your Honor is undoubtedly familiar with most of those cases, and most of them are directly contrary to the position now taken by the accused. For example, in State again Castelli, in 92 Connecticut, it is held that there is no rule of law in this state requiring a warning that the accused cannot be compelled to make a statement or that such statement may be used against him in order to make the confession admissible or inadmissible.

There are a number of other cases that support that same principle. State against Willis in 71 Connecticut 293, and State versus Palco, 121 Connecticut 669 at 680.

Now, some reference was made to a telephone call. That has been designated as a fake. I think your Honor is undoubtedly familiar with the statement in State against Palco, which rules that a trick which has no tendency to produce a confession except one in accordance with the truth is always admissible, and the confession made after an officer told the accused he had better tell

the truth is admissible the worst that such a vice could evoke is the truth. There is no risk of accepting a false confession.

I noticed, and it is significant, that counsel refused to make a claim that this treatment of the accused, such as it is claimed to be, evoked an untrue statement from the accused In other words, I think they should make that position clear. Do they claim that as a result of this treatment the accused thereupon made an untrue confession? I think that that is of some significance.

In State against DeBattista it is said that the trial court will weigh the claimed confession with the knowledge that sometimes an accused will untruly admit guilt or mis-state criminatory acts for the purpose of securing immunity through the promised favor. I don't think that the accused is ready to make a claim that this was an untrue confession, but I would be interested in hearing the statement from him on that point.

As far as access of counsel is concerned, there is no rule of law which requires counsel to be present at an interrogation by the police officers. It is obvious that any such rule of law would thwart investigations and prosecutions.

Your Honor may be familiar with State against Cross, where counsel for the accused made several applications to have an interview with the accused but was denied the privilege until he had obtained permission from the State's Attorney, whom he was unable to find until three days later, when the permission was then given. Notwithstanding that the accused was interrogated in the meantime, the confessions and statements were admitted in evidence.

I don't know of any case where this question has been brought up as to the admissibility of the confession where there is so much evidence of freedom and voluntariliness in the statements given or any lack of abuse or threats or promises—I think in no case has a confession been so singularly free from any taint such as those.

Mr. Corse. May it please the Court, in the first place, as I'm sure Mr. Ullman knows well, the authorities on this matter, including the Connecticut authorities which he cites, are universal that it is not the truth of the confession that is in issue, it is the voluntariliness of the confession. The truth is entirely irrelevant.

Mr. ULLMAN. I don't know about that. The Supreme Court in several of its cases don't know it either.

Mr. CORSE. You're talking about ours?

Mr. ULLMAN. Our Supreme Court.

Mr. CORSE. Well, his Honor knows about our Supreme Court much better than you or I do, so there is no point in arguing about that.

There is also this point I should make for the record. There is the claim that that letter, under the authority of which he was brought to the State's Attorney's Office, means he was illegally detained in the State's Attorney's office. There is the general feeling apparently, in this county that prisoners who are bound over to the Superior Court are the personal property of the State's Attorney and he may do anything he pleases with them. That is a matter we have made a point of before and we will raise that question again, and I want to make the point that that is also in this case with regard to lack of threats or promises toward the accused, and Chief Eagan detailed the facts regarding Chief Eagan's threat to bring Mrs. Rogers, who, the accused testifies, was very ill at the time, into this matter. That certainly is a threat.

The COURT. Did you have anything further? Go ahead.

Mr. ULLMAN. I just want to make one more reference, perhaps, to two things that were mentioned there. Apparently, the only thing upon which counsel is really relying is the benefit that the accused hoped to get by reason of not having his wife come down. On that point the law is, as I understand it to be, and as stated in 20 American Jurisprudence, on page 437: "The hope of benefit influencing a confession which will render it involuntary must relate to the particular crime confessed. It cannot be of collateral or incidental benefit." That is all this could possibly be claimed for, the fact that his wife was not disturbed somewhere around nine or ten or eleven o'clock on that particular Saturday night. That is the law as stated in American Jurisprudence and in numerous cases. For example, in one case, that promise that if he confessed there would be some help about getting him a bond.

That is held universally to be merely a collateral benefit and as such would not invalidate a confession.

Insofar as the other point that counsel just mentioned is concerned, the fact of illegal detention, there is not any information that the accused knew that he was being illegally detained when he was brought down here, and there are a number of cases that hold that there is no basis for any such claim in excluding a confession. State against Zakauskis and State against Buteau are ample authority for that rule of law.

The COURT. Well, I don't think I have heard anything that should cause me to believe that the circumstances attending the episode involving the confession should render it inadmissible, so I'm going to overrule your objection to the admissibility of the statement.

Mr. CORSE. Exception.

The COURT. An exception may be noted.

66. As part of its evidence in this case, after a preliminary hearing in the absence of the jury, the State offered a transcription of a statement made by the accused before the Coroner for New Haven County on the afternoon of January 31, 1954. When the following occurred:

Mr. ROBINSON. We have no further evidence on the question of fact. I assume the offer is made and we object to it and we cite to your Honor the authorities cited in reference to the other confession, and I call your Honor's attention to the fact that in the Stroble case the fact that an involuntary confession is made and admitted does not allow other confessions to be made that follow that, particularly where obviously, from the preliminaries in this statement, one of the assumptions of fact is that such an involuntary—such a statement has been made at a prior time.

Also, we wish to add the further consideration that the right given to this accused by the statutes is a real right. It can't be waived by simply telling him something and having him say he understands it. Until the Court is convinced that there is such an understanding and such a voluntary waiver, the failure to adequately inform the accused as to his rights and privileges, and, too, I believe in the case of persons who are not familiar with

the higher reaches of English diction, as this accused obviously was not from what we have read, that is sort of a routine instruction and does not meet the requirements, and for that reason any statement he made should be excluded. To admit it is a violation also of the constitutional protection of the accused not to be forced to testify against himself, and of due process and the due process guarantee under the 14th Amendment of the Federal Constitution.

Mr. ULLMAN. I don't think, your Honor please, it is necessary to make any prolonged statement in this connection. It certainly seems to be that the Coroner repeatedly and in language that is clear and concise informed the accused as to his rights, first, to refuse to testify, and secondly, to have counsel and informed him further that the statement must be voluntary, must be made freely of his own wish, his own decision, and if made might well be used against him in a prosecution for crime, and going on further to say that there was no reward or promise of immunity held forth to him. Then, at the conclusion of it, your Honor will observe the Coroner then asks, out of an excess of caution, perhaps, "Do I make myself clear?" And the accused states, unequivocally, "I understand." Presumably, of necessity I think it must be presumed that if the accused had said that he didn't understand the Coroner would have gone on further to inform him on that subject if any further elucidation were required, but obviously it was not.

The accused is not a youngster. This accused, from the evidence, had been arrested before. This accused, from the evidence, too, is a brother of a police officer and there is nothing that indicates that he is deficient in mentality. Your Honor observed him on the stand where he answered questions indicating that he had a high sense of perception and a fairly high intelligence, and I think that probably will be further demonstrated later if the accused does take the stand and will be demonstrated further from his answers to the questions put to him by the Coroner as well as those that are already in evidence as having been put to him by Detective Eagan. The accused chose himself to answer these questions freely and without counsel, although he was informed that he was entitled to have counsel. Beyond that nothing

further need be done. I think there is no question about the admissibility of this statement.

The COURT. Well, I think that what I should observe in the light of the comments that counsel have made is at least this, that if there might be a situation where an accused person would be entitled to a more, oh, elaborate explanation—that, in substance, is what you are complaining about, among other things, Mr. Robinson—

Mr. ROBINSON. I don't want to be whittled quite down to that—

The COURT. It isn't quite down to that, but that's pretty much what I think you're pointing to, namely, that the Coroner should have taken and broken down, in effect, each one of these sentences which have been read into the record that he employed preliminary to taking the statement, that he should have broken it down into a more careful definition of what an inquest was and what the right of counsel meant, and so forth. I say if there was a case where such a thing might be warranted, but I'm not impressed that it was required here, and I'm saying that because I'm taking into account, if I have a right to, what I observed of this accused while he was on the witness stand put on by you yesterday in the course of the preliminary inquiry relating to the other confession, and there was nothing in that examination that could give me the idea that he didn't comprehend very clearly everything that was transpiring when he was apparently brought by the Coroner down for this hearing. So I think I would have to come to the conclusion that he was given—made aware by the Coroner of all of the rights that he had, and it certainly appears to me if he went on to make a statement he did it voluntarily.

Mr. ROBINSON. Well, of course, I hope your Honor will allow me, before you make the ruling on that basis, to be sure that you are overruling my other claims which are based, of course, on the gross illegality of holding a man in this way.

The COURT. Oh, yes, I understand that.

Mr. ROBINSON. Sooner or later that matter ought to be stopped, but that is neither here nor there. I also want to preserve that point, and I want to preserve the point that there is implicit

in this situation as it is before your Honor, in judging whether or not simply telling a man he is entitled to counsel after he—the evidence shows without any contradiction up to this point—I take it the fact that Mr. Mulhern or Lieutenant Mulhern has not denied he was asked by the accused to let him see his lawyer—he hasn't denied that—that we must assume that to be true. Having once been ignored, at least in a hearing the night before, and out of that situation there has come what must be any human being, a serious realization that he has sort of shot the bolt, so to speak, and then being dragged down into a more formal hearing and simply being told "You are entitled to counsel" seems to me aggravates the situation. I make all the claims that I made in the objection so that when your Honor rules I trust I will have the benefit—

The COURT. Oh, yes. I think you have presented clearly what you claim regarding his detention, and I will overrule your objection.

Mr. ROBINSON. And will you give me an exception?

The COURT. Exception may be noted.

And later the following occurred:

Mr. ULLMAN. I offer this transcript, of which counsel has a copy, I believe.

Mr. ROBINSON. I think your Honor has already ruled it is admissible.

Mr. ULLMAN. I will make that offer formally now.

The COURT. All right, I'll overrule the objection that is made to its admission and allow an exception and order it marked.

Mr. ROBINSON. That, of course, is on the basis of the colloquy we had on the objection that was made in the absence of the jury.

The COURT. That's right.

Mr. ROBINSON. So I won't have to repeat it.

(The statement referred to was received in evidence and marked State's Exhibit WW.)

67. James P. Redding, a witness called by the accused testified that he was the Sheriff of New Haven County, that, as such, he had custody of the accused on January 31, 1954, that on the morning of that day Attorney Chester T. Corse requested per-

mission to see the accused and that, on verbal instructions of the Coroner and the State's Attorney, he refused said permission. Thereafter the following took place:

Q. I see, and this order to hold Rogers incommunicado is an order that is usual and customary, is it not—

Mr. CORSE. That is objected to.

Q. —in first degree murder cases.

Mr. CORSE. That is objected to.

Mr. ULLMAN. Claim it, if your Honor please.

Mr. CORSE. Custom is irrelevant. The question is whether it happened or not.

Mr. ULLMAN. I think that may have some bearing on it.

The COURT. Overrule the objection.

Mr. CORSE. Have an exception?

The COURT. Exception.

(Question read.)

The WITNESS. That's right, it is.

68. David J. Patterson, a witness called by the accused, testified that he was on January 30, 1954, Deputy Jailer of New Haven County; that, on that date, the accused was removed from the jail by County Detective Flanagan under the purported authority of a letter from the State's Attorney's office, Defendant's Exhibit 4, and thereafter the following occurred:

Cross-examination by Mr. Ullman.

Q. This authorization permitting you to turn over or release Rogers to County Detective Flanagan, that is something that is done usually, is it not, in cases—

Mr. CORSE. That is objected to.

Q. —of persons charged with crime? A. All the time.

Mr. CORSE. Objected to.

The COURT. What is the objection?

Mr. CORSE. The question whether it is usually done has nothing to do with the case, if your Honor please. The question is whether it was done here.

The COURT. Overruled.

Mr. CORSE. Have an exception?

The COURT. Exception.

Q. Your answer is "Yes?" A. Yes.

69. Mrs. Vera Evans, a witness called by the accused, testified that she was his niece by marriage, that she had known him for thirty-two years, that he had been hospitalized because of carbon monoxide poisoning in 1948, and that she had noticed a change in him after that hospitalization. Thereafter on cross-examination by the State's Attorney, the following occurred:

Q. Do you consider that that is what led him to commit this crime?

Mr. ROBINSON. I object to that. That is not fair cross examination of this witness. The witness has told, simply, as to what she saw, and her opinion hasn't been asked for. I have no idea what it is.

Mr. ULLMAN. How, otherwise, may I ask, would this evidence be relevant, if it is not to affect that issue. I think—

Mr. ROBINSON. I'll tell you—

Mr. ULLMAN. That is what counsel meant by the statement he made to your Honor when you Honor allowed the evidence.

Mr. ROBINSON. It is relevant on one of those facts which can in this case, as the law is now, be considered by the jury in determining what the penalty shall be, and that is the reason it is offered. It isn't offered as having any other bearing, and I object, further, on the ground that the opinion of this witness has no bearing. I didn't ask her whether in her opinion this thing, whatever he did, was done because of this gas accident—gas occurrence. This is one of the things in this man's life.

Mr. ULLMAN. I suppose that is what counsel is going to claim.

Mr. ROBINSON. Well, what I'm going to claim and what you are going to claim, I hope is as much a closed book to you as what you are going to claim to me.

Mr. ULLMAN. All right. I think that—

The COURT. That is what disturbs me. He doesn't know just what you are going to claim.

Mr. ULLMAN. That's right. I want to be prepared for all contingencies, Mr. Robinson.

Mr. ROBINSON. Well, then—

The COURT. That is really what his problem is.

Mr. ULLMAN. The witness stated that she noted that he was different.

The COURT. Let me hear the question, Mr. Whay.

(Question read.)

The WITNESS. I don't know.

The COURT. Well, I believe this is relevant. I will allow it and overrule the objection.

Mr. ROBINSON. Have an exception?

The COURT. Exception may be noted.

Mr. ROBINSON. Also assumes, at this stage of the game, that he committed a crime. Whatever my friend's notion is, after all is said and done——

Mr. ULLMAN. Didn't counsel say that this is intended to affect the penalty, the disposition?

Mr. ROBINSON. I offer it on that basis.

Mr. ULLMAN. You have to take a position, some time.

Mr. ROBINSON. Have an exception?

The COURT. Exception may be noted.

Mr. ROBINSON. Your Honor allow me the benefit of an exception?

(Question and answer read.)

Mr. ULLMAN. The question—the answer, rather is, "I don't know?".

The REPORTER. Yes, sir.

70. Immediately thereafter the following occurred:

Q. Are you aware of the fact that Mr. Rogers had committed the crime of robbery before 1948 also?

Mr. ROBINSON. Objected to. Certainly improper and I would like to ask that the jury be dismissed and entertain a motion for a mistrial.

Mr. ULLMAN. I fail to see its impropriety.

Mr. ROBINSON. Well, I will point it out to the Court.

Mr. ULLMAN. Counsel is apparently attempting to claim that this man was different after 1948.

The Court thereupon heard arguments of counsel in the absence of the Jury and thereafter sustained the objection and excluded

the question and immediately instructed the Jury to disregard the question and any implication connected therewith.

The Court denied the motion for a mistrial and the accused duly excepted.

SIXTH

Hearing on Admissibility of Exhibit VV.

The State through Assistant Chief of Police Raymond Eagan sought to offer in evidence the statement made by the accused on the night of January 30, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.

On the evidence adduced on this issue the following facts were proven:

71. On Saturday, November 21, 1953, the body of Mrs. Dorothy Kennedy was found in the West Shore Package Store under circumstances indicating that she had died from bullet wounds during the course of a robbery committed by a person unknown.

72. Thereafter investigations into this crime were conducted by the West Haven Police and other prosecuting authorities to no avail.

73. On the evening of January 9, 1954, the New Haven Police arrested the accused on charges of crime committed that day at the Travelers Hotel in New Haven.

74. At the time of his arrest the accused had in his possession a loaded 38 calibre Smith & Wesson revolver.

75. The accused was questioned by police that evening and claimed he had won the gun in a "crap game" that day.

76. On being questioned further on the following day the accused admitted having stolen the gun from the home of his nephew George Evans.

77. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.

78. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.

79. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.

80. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

81. Thereupon a letter from the State's Attorney's Office was delivered to the Jailer requesting him to permit police officers to take the accused to the State's Attorney's Office for questioning.

82. In compliance with this request, the accused was presented at the State's Attorney's Office shortly after noon.

83. During his first hour at the State's Attorney's Office the accused was not questioned at all.

84. Thereafter on questioning by the officers he denied knowledge of or implication in the murder of Mrs. Kennedy.

85. During this questioning and at all times while at the State's Attorney's Office the accused was seated in an armchair, his handcuffs released so that the cuffs were attached to only one wrist and his hands and arms free.

86. The accused was permitted to smoke cigarettes and did smoke during the afternoon and evening, some of the cigarettes being furnished by police officers in attendance.

87. At about 4 o'clock in the afternoon he was given a sandwich and coffee which he consumed.

88. In response to a telephone call Assistant Police Chief Eagan arrived at the State's Attorney's Office about 8 P. M. and thereupon proceeded to question the accused further.

89. The accused persisted in his denials and during the course of the questioning Chief Eagan informed the accused he was intending to send for the accused's wife in order to question her as to any knowledge she might have of the affair.

90. Chief Eagan then pretended to put through a telephone call to Police Headquarters stating, in the hearing of the accused, that he would call the officers later with respect to sending for Mrs. Rogers.

91. During the hour following this fictitious call Chief Eagan questioned the accused further and also asked him if he wanted anything to eat and the accused requested coffee.

92. Chief Eagan then indicated he was ready to call the officers again to instruct them to bring Mrs. Rogers to the State's Attorney's Office whereupon the accused announced his readiness to make a statement.

93. After a few brief admissions by the accused, one of the Official Court Reporters was summoned and a stenographic record was made of the statements made by the accused in response to questions by Chief Eagan, which statement is Exhibit VV.

94. At the conclusion of the statement the accused signed the stenographic notes.

95. Although the statement started about 10:40 P. M. and ended about midnight there were interruptions for coffee, cigarettes and short recesses.

96. At no time was the accused subjected to continuous or extended questioning.

97. No force, threats or inducements were made or offered to the accused at any time.

98. The accused acknowledged at the trial that he was not abused and made no complaint at any time of his treatment by the police.

99. The treatment of the accused by the investigators was at all times considerate.

100. The accused had experienced previous arrests and interrogations by the police and the treatment accorded him on this occasion did not adversely affect him.

101. The accused did not at any time on the day of the questioning request the presence or assistance of an attorney.

102. The accused answered the questions put to him directly and unhesistatingly.

103. The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth.

104. Neither at the trial or in his Claims of Proof on this Appeal did the accused make any claim that his statement admitting the shooting of Mrs. Kennedy was untrue.

105. The delivery of the accused to the State's Attorney's Office and his presence there on January 30th were not unlawful

106. If there was any element of irregularity or illegality in his presence at the State's Attorney's Office on that date, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession.

107. The statement made by the accused to the police on this date was freely and voluntarily made and accordingly was admissible in evidence.

SEVENTH

Hearing on Admissibility of Exhibit WW.

The State through Coroner James J. Corrigan sought to offer in evidence a statement made by the accused at the Inquest conducted by the Coroner on January 31, 1954, whereupon the

Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.

On the evidence adduced on this issue, the following facts were proven:

108. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.

109. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.

110. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.

111. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

112. During the morning of January 31, 1954, James J. Corrigan, Coroner for New Haven County, was informed that the accused had on the preceding evening confessed to the police his murder of Mrs. Kennedy, and the Coroner thereupon instructed that he was issuing a warrant to hold the accused incommunicado at the County Jail.

113. During that morning Coroner Corrigan was for several hours engaged in the investigation of a gas explosion that caused several deaths that day.

114. About noon on that day Attorney Chester T. Corse, an office associate of Attorney Robinson, asked the Sheriff for permission to see the accused and was informed by the Sheriff that the accused was being held incommunicado on the Coroner's order.

115. Shortly afterwards the Coroner's warrant was delivered to the Sheriff at the Jail directing him to hold the accused at the County Jail pending further orders from the Coroner.

116. In the later afternoon of that day the Coroner telephoned the Sheriff and asked that the accused be brought to the Coroner's Office for questioning.

17. Thereupon the Sheriff delivered the accused to the Coroner's Office and the Coroner administered to the accused the usual oath.

118. Before proceeding to interrogate the accused, the Coroner cautioned him as to his constitutional rights, informing him that he was under no duty to answer questions and that he had the right to refuse to give testimony and that any testimony he might give might be used against him.

119. The accused was further told by the Coroner that he had the right to be represented by counsel if he wished.

120. The accused after hearing the cautionary remarks of the Coroner, stated that he understood his rights and averred his willingness to testify.

121. No threats of harm or promises of reward were made by the Coroner to the accused.

122. The accused understood the language used by the Coroner and the rights afforded to him under the Constitution of the United States and the laws of this State.

123. The accused is highly intelligent and fully comprehended the statements made to him by the Coroner.

124. The accused was the brother of a police officer and had experienced previous arrests and interrogations by the Police.

125. The accused did not ask to be represented by counsel.

126. The accused voluntarily chose to testify after hearing from the Coroner that he was entitled to counsel and that anything he said might be used against him.

127. The accused answered the questions calmly and voluntarily.

128. The questioning by the Coroner lasted about an hour and one-half and thereupon the accused was returned by the Sheriff to the County Jail and his incommunicado status was released the following day.

129. The delivery of the accused to the Coroner's Office and his presence there for questioning were not unlawful.

130. If there was any element of irregularity or illegality in his presence at the Coroner's Office on that day, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession to the Coroner.

131. The statement made by the accused to the Coroner was substantially the same as that made by him the previous evening to the Police.

132. The statement of the accused was freely and voluntarily made and accordingly was admissible in evidence.

EIGHTH

133. All the exhibits in this case are hereby made a part of this Finding and may be used in the Supreme Court of Errors without being printed.

NINTH

134. The New Haven Register is a daily newspaper published in the City of New Haven with a daily circulation within the County of New Haven of about 90,000. The New Haven Journal-Courier is a daily morning newspaper published in New Haven with a circulation in New Haven County of about 21,000. The Bridgeport Sunday Herald is a weekly newspaper published in Bridgeport with a New Haven edition having a circulation within New Haven County of between 30,000 and 40,000.

135. The population of New Haven County is about 545,000.

136. The Court received in evidence on the hearing on these motions printed articles from these newspapers which were marked as exhibits from A to M inclusive, but which to avoid confusion with exhibits later received and marked in the same manner upon the trial in chief are hereby remarked, as exhibits A', B', C', D', E', F', G', H', I', J', K', L', M', and are as follows:

A'	New Haven Journal-Courier	Nov. 23, 1953
B'	New Haven Journal-Courier	Nov. 24, 1953
C'	New Haven Journal-Courier	Nov. 25, 1953
D'	Bridgeport Herald	Nov. 29, 1953
E'	Bridgeport Herald	Dec. 6, 1953
F'	Bridgeport Herald	Feb. 28, 1954
G'	New Haven Register	Jan. 31, 1954
H'	New Haven Register	Feb. 1, 1954
I'	New Haven Journal-Courier	Feb. 1, 1954
J'	Bridgeport Herald	Feb. 7, 1954
K'	New Haven Register	Feb. 2, 1954
L'	New Haven Register	April 28, 1954
M'	New Haven Register	April 24, 1954

Said exhibits so remarked may be used on appeal without printing.

137. From Nov. 21, 1953, there were news stories in the New Haven Register within the next few days substantially similar in import to those which appear in the Journal-Courier as Exhibits A', B', C' and I'. And there was also more or less continued publicity concerning the case from Nov. 1, 1953, to the date of the hearing on the motions, but until Jan. 30, 1954, this publicity did not connect the accused with the death of Mrs. Kennedy.

138. The first motion for a change of venue was argued on April 23, 1954, at which time Exhibits A'-K' inclusive were presented. Thereafter on April 29, 1954, another motion to the same effect was presented when Exhibits L and M were received in evidence.

Whereupon the following transpired.

The COURT. I don't feel that what is involved in your additional Motion materially changes the situation, and I am going to deny the motion.

Mr. CORSE. May we have an exception?

The COURT. Exception.

139. There was no showing that any members of the panel had any knowledge or recollection of the newspaper articles.

140. From the voir dire examination it appeared that the jurors who were accepted in the case had no recollection of having read or heard of any confession by the accused.

141. In the selection of the trial jury the accused used only twenty-three of the thirty peremptory challenges available to him.

142. On the trial of the case the State's Attorney introduced in evidence two confessions of this crime by the accused.

143. Neither in the selection of the jury or in the trial of this case was there anything to indicate that the newspaper articles had any prejudicial effect upon the jury.

144. Neither in the selection of the jury nor during the course of the trial did it appear that a fair and impartial trial could not be had in this County.

145. The motions for change of venue were denied.

MELLITZ, J.

[Filed Oct. 1, 1954.]

AMENDMENT TO FINDING.

The finding heretofore made herein is amended by adding thereto the following.

["Ninth" printed as paragraphs 134 through 145 of finding as amended pages .]

MELLITZ, J.

[Filed Dec. 23, 1954.]

ASSIGNMENTS OF ERROR.

The Court erred:

1. In denying the defendant's motions for a change of venue.

2. In refusing to charge the jury in accordance with the requests to charge as stated in paragraphs 52, 53 and 54 of the finding.

3. In charging the jury as stated in paragraphs 55, 56, 57, 58 and 59 of the finding.

4. In ruling upon evidence as stated in paragraphs 63, 64, 65, 66-67, 68 and 69 of the finding.

5. In denying defendant's motion for a mistrial as stated in paragraph 70 of the finding.

6. In finding the facts as set forth in paragraph 78 of the finding without evidence, and because there were no proceedings in the Superior Court at that time in which an appearance could be filed.

7. In finding the facts as set forth in paragraphs 80, 83, 85, 91, 95, 96, 97, 100, 101, 102 and 103 without evidence.

8. In drawing the conclusions set forth in paragraphs 99 to 103 of the finding when the subordinate facts do not support them.

9. In finding the facts as set forth in paragraph 104 when the claims of the State show the substantial falsity of Exhibit VV.

10. In ruling as stated in paragraphs 105, 106 and 107 of the finding.

11. In finding the facts as set forth in paragraph 109 of the finding, as no such proceedings were in the Superior Court at that time in which an appearance could be filed.

12. In finding the facts as set forth in paragraph 111 without evidence.

13. In drawing the conclusion set forth in paragraph 122 of the finding when the subordinate facts and the Exhibit WW do not support them.

14. In finding the facts as set forth in paragraphs 123, 124, 125 and 126 of the finding without evidence.

15. In drawing the conclusions set forth in paragraphs 127 and 130 when the subordinate facts do not support them.

16. In ruling as set forth in paragraphs 129, 130 and 132 of the finding.

The Defendant,
By THOMAS R. ROBINSON,
His Attorney.

[Filed Oct. 28, 1954.]

[Corrections refused, Oct. 28, 1954, MELEITZ, J.]

[Assignment of Error to Amendment to Finding filed January 18, 1955, not printed since it is the same as paragraph 1 of Assignments of Errors filed Oct. 28, 1954.]

SUPREME COURT OF ERRORS,
NEW HAVEN COUNTY, } Clerk's Office.
February 11, 1955.

The above and foregoing is a true copy of the record in said case to be used in the trial in the Supreme Court of Errors.

EDWARD HORWITZ, Clerk.

RESPONDENT'S EXHIBIT AB FOR IDENTIFICATION

INTERROGATION OF HAROLD D. ROGERS BY ASS'T POLICE CHIEF RAYMOND J. EAGAN, CONDUCTED AT THE COUNTY COURT HOUSE, NEW HAVEN, CONNECTICUT, ON THE EVENING OF SATURDAY, JANUARY 30, 1954

ROBERT R. LYMAN

Shorthand Reporter

County Court House, New Haven, Conn.

Examination by Ass't Chief Raymond J. Eagan

Q. Now, I'll ask you some questions, Harold, and Mr. Lyman will write down here.

Your full name? A. Harold D. Rogers.

Q. How old are you, Harold? A. Forty-six.

Q. Where do you reside? A. 704 Orchard Street.

Ass't Chief EAGAN. You want to give him the coffee now?

Q. Are you married? A. Yes.

Q. How many children have you? A. Two.

Q. How old are they? A. Seven and five.

Q. Is your wife living and residing with you? A. 704 Orchard Street.

Q. What's her name? A. Helen.

Q. Harold, about a half hour ago you orally admitted to Detective Flanagan, County Detective Flanagan, and myself that you shot a woman in a liquor store on Ocean Avenue, West Haven on November 21, 1953— A. That's right.

Q. Is that right? A. Yes.

Q. Do you know the name of the woman who was shot? A. I don't know her name. I used to call her Baby all the time.

Q. Now, will you tell in your own way of everything that

happened that night before and during and after the shooting. A. I went down Oak Street and bought a half pint of whiskey in a package store, must have been about 5:30 or 6 o'clock, and I drove out to West Haven and I went in the package store. I been in there a lot of times before. I got money from her before, too. I asked for twenty-five dollars. She called me a black son-of-a-bitch and she said, "All you want me for is for my money." There was a fifth of whiskey sitting near the desk in the back of the store, and she had a sandwich on the desk, and the fifth of whiskey was open. So we sat down and drank for a while. That's when she said she wasn't giving me no more money. I knowed her about five or six months. I used to go with her, take her up Dixwell Avenue to the Nelson Hotel. I got her there about four or five times. When I asked her for the money, she started—she scratched me on the hand and slapped me twice in the face. She started fighting me. That's when I guess I shot her, and I took about sixty dollars out of the cash register and left. The car was parked on the other side of the street, about three doors down from the store. I went to the first road and made a U-turn and came right straight back to New Haven, parked the car on the corner of Gregory and Dixwell Avenue, stayed there until about 1 o'clock, and I went home. That's all.

Q. What time of night did you go to the store? A. About 7 o'clock, I imagine. A little after 7, maybe.

Q. How long were you in the store? A. About an hour—three-quarters of an hour, something like that, maybe.

Q. What did you do when you first came in the store? A. She was sitting down eating a sandwich, and there was a bottle of whiskey open on the floor. In fact, she was drinking whiskey and eating the sandwich.

Q. What did you say to her? A. I told her I needed twenty-five dollars.

Q. What did she say to you? A. She said, "I ain't giving you a damn penny, you black son-of-a-bitch." She said, "All you want me for is for my money."

Q. Did anyone come in that store while you were there? A. No.

Q. Do you remember a short time ago telling Detective Flanagan and myself that a man came in from across the street and bought whiskey? A. He came in—yes, he—the man did come in from—I don't know—like he came from across the street. He came down the street a ways. I don't think he came from directly across the street.

Q. Do you know what kind of whiskey he bought? A. No. He bought a fifth of whiskey. That's all I know.

Q. What kind of looking man was he? Describe him. A. He looked about a middle age man. He reminds me of the man sitting over there—

Q. In what way? A. Or the one behind him.

Q. He reminds—looks something like Captain Stephen Wilson? A. That's right.

Q. He reminds you something— A. Built something like him, yes.

Q. Was he as heavy as him? A. About the same weight and same height.

Q. What age would you figure him? A. About fifty, fifty-five.

Q. Did he have a hat on? A. Yes.

Q. Would you describe his clothing. A. He had a dark suit on. I don't know whether it was black or gray or dark—what do you call it, oxford gray?

Q. Yes. A. It was dark like that. May have been navy blue. I don't know.

Q. What kind of hat did he have? A. Felt hat, slouch hat, fedora.

Q. Color? A. Gray.

Q. Did you notice what kind of shirt he was wearing? A. No, I didn't pay that much attention to him. I imagine he had a white shirt on.

Q. Did he have an overcoat or topcoat on? A. I don't think so. That's why I know he didn't come from far.

Q. What nationality would you say he was? A. American, I guess.

Q. Did you notice the color of his hair? A. Yes, it was sort of grayish.

Q. How long was he in the store? A. About three or four minutes.

Q. Previous to his coming in the store had you already had the argument with her? A. No.

Q. Then the argument took place after he left? A. That's right.

Q. What brand of whiskey was this woman drinking? A. Imperial, I think. I'm not sure. I think it was Imperial, something like that. There was a black label on the bottle.

Q. You drank from this bottle with her? A. Yes, that's right.

Q. How much liquor was consumed? A. About that much was left in the bottle. (Indicating.)

Q. About an inch and a half was left in the bottle the way you describe it? A. Yes, that's right.

Q. And it was near full when you started? A. That's right.

Q. You say that she gave you an argument? A. That's right.

Q. Did she do anything to you physically? A. She slapped me in the face twice and scratched my hand here. (Indicating.)

Q. Looking at the back of your left hand, you have a scar there about five-eighths of an inch long just in back of the middle finger. Is that the scratch you got from her at that time? A. That's right.

Q. After she hit you the two slaps in the face and scratched your hand, did you hit her? A. I shoved her.

Q. What happened when you shoved her? A. She come back after me again. That's when I guess I shot her.

Q. You guess that's when you shot her. Do you know how many times you shot her? A. About four times, I guess.

Q. About four times. What happened after you fired the last shot to her? A. I left and went out of the store—took the money out of the cash register—

Q. What happened to her? A. She was still standing up when I left.

Q. Then you went where? A. I went out and got in the car and drove down to the next corner, made a U-turn, and come back to the city.

Q. I interrupted you there a moment ago. You started to say you went to the cash register. A. Yes.

Q. Will you explain that. A. I took about sixty dollars out of the cash register.

Q. How did you open the cash register? A. I rang—I pushed the button down.

Q. Which button did you push down? A. I don't know. I just pushed one of them down so the cash register would shoot open.

Q. You don't know whether it was a no-sale or an amount? A. I don't know what it was.

Q. Describe this liquor store that you were in, how you get to it, where it is located. A. It's a little ways out of Savin Rock.

Q. Whereabouts? A. It's on this side of the road, near the water.

Q. It's on the water side of the road? A. Yes. Sits by itself.

Q. Is it set back from the road or is it right on the road? A. Sets back from the road a little ways.

Q. How big a place is it? A. Ain't as big as this room.

Q. How many rooms are there? A. One, I think.

Q. From the cash register what type of money did you take? A. Small bills.

Q. Was it all bills? A. No, some silver.

Q. How much of this sixty dollars do you figure was silver? A. About seven or eight dollars worth, I guess.

Q. Do you know the name of the woman now who was shot? A. All I called her was Baby. That's all I know. I think her name was Dorothy.

Q. Dorothy? You know her last name now? A. No, I don't know her last name.

Q. Have you read the papers since it happened? A. No.

Q. You never have? A. I never read about it at all.

Q. Then you have never heard her last name? A. No.

Q. But you did know or feel her name was Dorothy? A. I've heard somebody call her Dorothy.

Q. You called her— A. Baby.

Q. Baby. Will you describe her to me. A. Oh, she was about five foot two or three tall and must have weighed about 120—11" or 120 pounds. She had dark hair, fair complexion.

Q. Approximate age? A. About thirty-five. I think she told me she was thirty-five.

Q. Did she wear eyeglasses? A. She didn't have none on then. I never seen her with eyeglasses on.

Q. Did she have on a store coat? A. No.

Q. How was she dressed? A. She had a shirtwaist and skirt on, I think.

Q. What color shirtwaist? A. It was light, and the skirt was dark.

Q. A light waist? A. And a dark skirt. Pretty sure she had it on. I'm not sure exactly.

Q. How did she comb her hair? Was it parted? A. I think it was parted in the middle.

Q. Did she have any costume jewelry on or anything? A. I didn't see any.

Q. You said you had been with her how many times? A. About four or five times.

Q. What kind of jewelry did she have or wear? A. She never wore any when she was with me.

Q. None at all? A. No. She wore a wristwatch once.

Q. What kind of wristwatch? A. I don't know the name of it.

Q. Can you describe it? A. It was a gold filled with an expansion band on it.

Q. Yellow gold or white gold? A. Yellow gold.

Q. Do you know the shape of the watch? A. Octagon shape.

Q. Did she wear any rings? A. I don't know whether she had a wedding ring on or not. I don't remember seeing any on her.

Q. At any time? A. I don't remember seeing any on her.

Q. Now, the gun that you used that night, where did you get that gun? A. My nephew-in-law's house.

Q. And what is your nephew-in-law's name? A. George Evans.

Q. George Evans? A. Yes.

Q. Where does he live? A. 5 Admiral Street.

Q. How did you get possession of that gun and when? A. About two days before he reported it missing.

Q. When you say about two days before he reported it missing,

you know that he did report it missing on November 22; is that right? A. That's right.

Q. So that would place the gun that you had taken from George Evans' home on November 20? A. That's right.

Q. In other words, that was the day before the shooting? A. That's right.

Q. How did you get the gun? A. I went upstairs in the back and went in the front room and took it.

Q. What time was this on November 20? A. During the afternoon.

Q. Who was in the home when you w e there? A. My niece and her three kids.

Q. What is your niece's name? A. Vera.

Q. Was George Evans at home? A. No.

Q. What part of the house was the gun in? A. In the bed table drawer, near the window.

Q. In whose room? A. In their room.

Q. That is, you mean George Evans' and his wife's room? A. That's right.

Q. And you took it from the bed table? A. That's right.

Q. Where did you get the ammunition for this gun? A. Out of the same drawer.

Q. How many bullets did you take? A. Six or eight, or something like that.

Q. Did you load the gun there? A. Loaded the gun in my car.

Q. Where was the car when you loaded it? A. In front of the door.

Q. In George Evans' home what floor is his bedroom on? A. Second floor, front bedroom.

Q. The second floor, and it's the front bedroom? A. Yes.

Q. Did you tell George Evans that you took this gun? A. No.

Q. You have stated that you knew Baby, as you call her— A. Yes.

Q. (Continuing)—for how long a period? A. Five or six months.

Q. How did you first come to know her? A. I went by the place. She smiled out of the door at me. Next time I stopped and bought a half pint of whiskey.

Q. Approximately when was the first time you went by there? A. About five or six months before November, in the summer.

Q. When you went in to buy the whiskey the first time, when was that? A. About two weeks later.

Q. What happened when you went in this time? A. We got in a conversation.

Q. Will you relate the conversation as best you remember it. A. I don't know. She told me her husband was no good to her physically.

Q. How did that come about that she mentioned her husband? A. I started kidding about her laughing at me outside the store. I asked her what she wants. She said she wanted somebody.

Q. Now, that was your second occasion—the first time you went by and the second time you went in? A. That's right.

Q. Did you make an appointment with her then? A. No, not then.

Q. When did you first, as you put it, go out with her? A. About three or four weeks later.

Q. Have you any idea what month that would be now? A. Must have been around May or June.

Q. May or June. That would be the first time you went out with her? A. That's right.

Q. When did you first take her to the Nelson Hotel? A. Same time I went out with her.

Q. Where is the Nelson Hotel located? A. Between Gregory and Charles on Dixwell Avenue.

Q. You don't know the number of it? A. No.

Q. Is this a hotel or rooming house? A. More like a rooming house.

Q. What time of the day did you go with this woman to this hotel? A. After the store closed. Night time.

Q. Well, it closed at different hours during the week. A. Must have been around 9:30 or 10 o'clock.

Q. What room did you occupy up there? A. Second floor, front bedroom.

Q. Second floor, front bedroom? A. Yes.

Q. By that you mean going upstairs, is it? A. That's right. You go up the stairs and you come to the front.

Q. One flight? A. That's right.

Q. Is there an office? A. No. Wasn't any then.

Q. How did you rent the room? A. I rented the room under an assumed name about two or three weeks before then.

Q. For what period of time did you rent this room? A. I kept it the whole time I was running with her.

Q. What name did you use? A. Howard Johnson.

Q. Did you give an address? A. No.

Q. Who was the landlord? A. Nelson, I guess.

Q. Did you meet him? A. I met him a couple of times.

Q. Was it from him you rented the room? A. No. I rented the room from the woman on the ground floor that takes care of the house.

Q. Do you know her name? A. No.

Q. How much did you pay for a room there? A. Ten dollars a week.

Q. Now, looking back, how long had you rented that room? A. About three weeks after I met her, when I first took her up there, I rented it about a couple of weeks before then.

Q. That would bring you somewhere in along about June? A. That's right.

Q. Do you still have this room? A. No.

Q. When did you give it up? A. After the accident occurred.

Q. Right after the accident occurred you gave it up. Did you leave anything at the hotel? A. No. I didn't have nothing there.

Q. How late would this woman stay with you at the hotel? A. Sometimes all night.

Q. You drove her there? A. That's right.

Q. You would get in there between 9:30 and 10 at night? A. That's right.

Q. Did you have intercourse with this woman? A. That's right.

Q. How many times? A. About four or five times.

Q. About four or five times? Did you use any protection? A. No.

Q. You just had normal intercourse without the use of any contraceptive of any kind? A. No.

Q. Did she have any objection to this? A. No.

Q. Did this women ever tell you how she could stay out all night? A. I don't think her husband was home, the way she acted.

Q. Did she tell you that? A. No, she didn't tell me that. She told me her husband was no good to her physically.

Q. Did you ever call her on the phone? A. No.

Q. Did you ever call the store? A. No.

Q. Now, will you describe the premises down there at the store. A. One big room.

Q. Explain it. As you would come in— A. Walking in the door a long counter is right straight across the floor, and a little space to go back, and like a bridge table or desk that sits in the corner.

Q. You mean as you walk in, directly in front of you is a counter? A. That's right, leads in across the front of the store, about three foot from the side wall.

Q. Which side of the store as you come in, using your left or right, is the table at? A. On the left-hand-side.

Q. On the left-hand-side? A. In the corner.

Q. And that's in back of the counter? A. That's right.

Q. What do they use for heat down there? A. I don't know.

Q. Was there any furnace you know of or any stove? A. I didn't see nothing.

Q. Never saw a stove in there? A. No.

Q. Where is the beer held, the cases? A. Right in the back, on the right-hand-side of the wall, they're stacked up.

Q. And the liquor shelves are where? A. All around the side of the building, on both sides.

Q. On the right and left as you enter there are shelves? A. That's right.

Q. Are there any shelves in back of the counter? A. I think there's a few of them.

Q. On the night you went down there what kind of clothing were you wearing? Describe your clothing. A. A blue jacket and brown pants and the black shoes I got on.

Q. Did you have a hat? A. No. Never wore a hat.

Q. You never wore a hat? A. No.

Q. You say you used your own car? A. That's right.

Q. What kind of car is it? A. 1949 Buick sedan.

Q. What color? A. Black sedanette. Two-door.

Q. Two-door? A. Yes.

Q. What is the marker number? A. 488.

Q. What are the letters? A. CZ.

Q. You said you never wore a hat? A. That's right.

Q. When you went into the store this night where did you have the gun? A. In my waist.

Q. What was your intention when you went to the store this night? A. To borrow twenty-five dollars from her.

Q. You intended to borrow twenty-five dollars; is that right? A. Yes.

Q. Why did you have the gun in your waist? A. I never left it in the car. I always took it out when I got out of the car.

Q. The only reason you had it was because you never left it in the car? A. That's right.

Q. Did you intend to do any harm to her with it if your got refused the money? A. No. I don't know how I come to use it. She never refused me before.

Q. After you left the store that night and got into your car, where did you go? A. I went to the corner and made a U-turn and come back up by the beach and come up to Gregory and Dixwell Avenue near Shifrin's.

Q. Where was your car parked in relation to the store that night? A. About three doors down across the street facing Milford.

Q. On the opposite side and towards the Milford end? A. Yes.

Q. How far did you have to travel to this corner where you made the U-turn? A. I don't know. Not very far.

Q. Approximately. A. Maybe about thirty or forty feet.

Q. How far did you go into this street to turn? A. I just went to the corner and made a U-turn.

Q. Did you turn into the street? A. Yes. I turned the head of my car into the street and came out.

Q. You came back up the same shore road past the liquor store? A. Yes.

Q. And you went to Dixwell Avenue and Gregory? A. That's right.

Q. What did you do there? A. I sat in the car.

Q. How long did you sit in the car? A. Until about 12 or 1 o'clock.

Q. Then what did you do? A. I went home.

Q. Did you take the gun home with you? A. Yes. I left the gun in the car that night, out in the yard.

Q. What happened to the bullets or the shells that were fired that night? A. I dumped them out.

Q. Where did you dump them out? A. I don't know where I threw them. Maybe I threw them in the ocean. I know I threw them out.

Q. Was there anything thrown by you or the woman that night in the store? A. She threw an ashtray at me.

Q. What kind of ashtray? A. I don't know what kind it was. It broke. I think it broke.

Q. Was it a glass one? A. Like—I don't know. It wasn't wood. It was made out of something breakable.

Q. Describe it the best way you can. A. I think it was brown.

Q. How large was it? Was it round or what? A. No, it was oblong shape.

Q. Oblong shape, and you think it was brown? A. Pretty sure it was brown.

Q. You smoke a lot? A. That's right.

Q. Did you use it? A. No.

Q. Didn't you smoke that night? A. Yes, I did. I threw the ashes on the floor.

Q. As you came out of the store, did you see anyone around? A. No.

Q. You saw no one? A. No.

Q. After you turned your car around and came back by the store, did you see anyone then? A. No.

Q. When you first went in the store and asked her for the money, what did she say? A. She said, "I ain't giving you no more money, you black son-of-a-bitch. All you want is my money."

Q. Was she sitting down when she said that? A. Yes, she was sitting at the table.

Q. Then what did you do? A. I went over and sat down beside her and started talking to her.

Q. Go on. A. I asked her why she wasn't giving me no mo[illegible]. She said, "All you want is my money, you black son-of-a-bitc[illegible]."

Q. What happened then? A. A guy come in and bought a fifth of whiskey.

Q. After he went out what happened? A. She slapped me in the face.

Q. How many times? A. Twice.

Q. What did you do? A. I shoved her, and she dug me in my hand.

Q. After you gave her a shove did she fall down? A. She fell over near the boxes, and she got up and started banging on me, and I hit her two or three times over the head with the butt of the gun.

Q. What boxes are you speaking of? A. I think it was the beer cases, I think, there.

Q. She fell near the beer cases? A. Yes, I think so.

Q. When you struck her over the head with the butt of the gun did she start to bleed? A. Yes, she went for the telephone.

Q. She went for the telephone. Did she get the telephone in her hand? A. She got it in her hand.

Q. What did she say when she got it in her hand? A. "I'm being killed," or something.

Q. Did you take the phone away from her? A. No, I never touched the phone.

Q. Did you hit her again? A. Yes, I hit her across the head again.

Q. With what? A. With the butt of the gun.

Q. Did she then drop the phone? A. Yes.

Q. Did she herself fall then? A. No, she come back at me again. That's when I shot her.

Q. Then, when she came back at you, you shot her? A. That's right.

Q. And you said you think four times? A. I think so.

Q. Did she fall then? A. No.

Q. What did you do? A. I left. Took the money out of the cash register and went out of the store.

Q. Where is the cash register located in reference to where she was at the phone? A. She was on the left-hand-side—on the right-hand-side of the store coming in and the cash register was on the left-hand-side at the end of the counter, right at the end of the counter.

Q. So if you were on the inside of the counter the cash register would be on your right if you were facing out; is that right? A. Yes.

Q. What kind of cash register was it? A. An old cash register.

Q. How large a one was it? A. Medium size, I imagine.

Q. What would you call medium size? A. About that big. (Indicating.)

Q. About fourteen inches wide? A. I imagine something about that.

Ass't Chief EAGAN. Twelve or fourteen inches wide, he describes.

Q. You recognize that? A. Yes, that's where the phone was on this side.

Q. Now— A. She fell back this way. (Indicating.)

Q. Where is the front of the store in relation to that telephone now? Here? A. Up in front of here. Right up around here.

Q. Do you recognize anything in the picture here? A. No.

Q. What is that there? A. An ashtray or frying pan or something. Q. Does that look anything like the ashtray she threw at you? A. No.

Q. That doesn't fit the description? A. No.

Q. Does this picture mean anything to you, showing you a view from the back end of the store looking toward the front door? A. That's right. Here's the counter, right about here.

Q. This counter in the back bottom of this picture you recognize? A. Yes.

Q. Does that mean anything to you now, that stove? A. That heater.

Q. You saw that heater there? A. Yes, I think so.

Asst. Chief EAGAN. He recognizes the heater on the right-hand-side.

Q. Where were you seated in that store? A. Behind the counter on this side, on the left-hand-side of the store coming in.

Q. Over here? A. Over this corner. (Indicating.)

Q. Is that the end the cash register is on? A. That's right.

Q. And that's the side that the table— A. Is in the corner. There's the opening, and there's the table back there.

Q. This is the table you're speaking of? A. Yes.

Q. In the far left end of the store as you enter? A. Yes.

Q. And the cash register not quite on the end of the counter? A. That's right.

Q. Is this the table you described she was seated at? A. I think it's the table.

Q. You think that's the table? A. Yes.

Q. Where were you seated? A. I wasn't sitting. I was standing at the side of the table. I don't know, it looked like the table was back further in the store than this.

Q. From this view, upon entering the store, is this the premises as you remember it? A. Looks like it. Looks like some boxes were back here somewhere.

Q. There's the boxes back on the right hand rear part of the store. Now, the phone is where? A. Right about here, behind this thing.

Q. Then over on that end on the right-hand— A. It's right in the corner.

Q. As you come into the store? A. Yes.

Q. Is that where the boxes were piled that she fell down against? A. That's right.

Q. What kind of chairs are in that place? A. Wire bottom chairs.

Q. Wire bottom chairs. Is there any other kind of chair there? A. I don't know. I don't remember.

Q. Any chairs with cushions on them or anything? A. I don't know.

Q. This type of chair you mean? A. Yes.

Q. Do you know if there's a back door there? A. I don't know. I never went out the back door.

Q. Showing you this picture with this woman lying on the floor, is that the girl you're speaking of? A. Yes.

Q. That's her? A. Looks like her.

Q. That's the girl you called Baby? A. Yes.

Q. And now know her to be Dorothy? A. That's right.

Q. You recognize anything in there now that you haven't seen before? What's this in the corner here? A. Looks like a compressor, I think, of cold air.

Q. You recognize that? A. I never seen it.

Q. What's this here? A. Icebox.

Q. You've seen that before? A. I don't remember seeing it.

Q. I meant to ask you. Did you ever take Baby, or Dorothy, as you now know her, to Sophie's on Oak Street? A. No.

Q. When you were at the Hotel Nelson, who did you ever meet up there that saw you with— A. Nobody.

Q. Nobody at any time? A. No.

Q. What time of the morning would she leave? A. Sometimes 5 or 6 o'clock in the morning.

Q. Would you drive her? A. I would drive her about a block from her house.

Q. You would drive her within a block of her house? A. Yes.

Q. Where did she live? A. I don't know. She used to get out not far from the store.

Q. She used to get out not far from the store? A. That's right, across the street.

Q. And that would be between 5 and 6 o'clock in the morning? A. That's right.

Q. Do you know where she actually lived? A. No, I don't.

Q. Was there anywhere you folks were together that anyone saw you? A. No, I don't think so.

Q. You said something before this statement about money matters with Baby. What were they? A. When I first met her I loaned her two hundred dollars, and from then on I would get fifty or sixty dollars anytime I got ready.

Q. Why did you loan her two hundred dollars? A. Because she needed it to pay a bill.

Q. You say from then on she used to give you how much? A. Fifty, sixty, sometimes thirty, twenty-five.

Q. Was that in repayment for the loan? A. No, I don't think so. She gave me the loan money back first.

Q. Why did she give you other monies? A. Because I was going with her, I guess.

Q. What was the last amount she gave you? A. Twenty-five dollars.

Q. When was that? A. About three weeks before the accident occurred.

Q. About three weeks before the accident occurred? A. Yes.

Q. When you got these monies over and above your loan of two hundred dollars, how would it be given to you? A. Sometimes twenty-five dollars, sometimes fifty dollars, sometimes thirty dollars at a time.

Q. What I meant by that, would you ask her for money? A. Yes, I told her I needed it.

Q. Did she ever question you? A. No.

Q. How much money do you feel you got from her above your loan? A. Maybe about a couple of hundred dollars, I guess.

Q. And the last time she refused to give you money; is that right? A. That's right.

Q. Now, you registered at the hotel under the name of what? A. Howard Johnson.

Q. Did this woman that rents rooms up there for Nelson know you? A. No.

Q. Were you ever questioned about bringing women to your room? A. She never saw me bringing any there.

Q. Harold, showing you this 38 caliber Smith and Wesson revolver, blue color, with the number 434194 here—you read that? 434194. A. I see it.

Q. And another number in here, 64858 it appears to be. Can you read that? I can't get it. A. 64858, I think.

Q. That's what you think it is, too. Is this the gun you used in the shooting on November 21 in the liquor store? A. Looks like it.

Q. It looks like it to you? A. Yes.

Q. This is the gun we took from you at the time of your apprehension or on your recent arrest? A. Looks liks the same one.

Q. Is this the same,—is the same gun you were arrested with the same gun you had that night? A. Yes.

Q. This is the same gun that we took from you.

Now, there has been filing on the bottom of the butt number. Did you file that? A. No.

Q. Was it filed that way when you had it? A. That's right.

Q. Does that indicate to you now that's the same gun you took from the home of Evans? A. Looks like it.

Q. On November 22 you, in company with your nephew-in-law, Evans, came to the detective division of the New Haven Police Department where he reported the theft of this gun; is that right? A. That's right.

Q. How did he happen to come to the detective division? A. I told him to report it.

Q. When did you tell him to report it? A. That Sunday.

Q. What conversation did you have with him that led up to you having him report it? A. I told him it was registered in his name.

Q. Was there any other reason you wanted to have him report this gun? A. No.

Q. On this date, November 22, you knew you had already used this in the shooting of this woman? A. Uh-huh.

Q. And at the time you accompanied George Evans to the detective division the gun was actually in your possession or under your control? A. It was in the compartment of my car, glove compartment.

Q. And where was your car then? A. Parked out in front of City Hall.

Q. You mean City Hall on Church Street or the Police Department on Court Street? A. City Hall on Church Street.

Q. That's where you parked your car? A. Yes.

Q. Did George Evans accuse you of taking this gun? A. He never accused me. He told my wife he thought I took it.

Q. Now, on this date of November 22 did he come to your home or where did you meet him? A. I went to his house.

Q. And the purpose of going to his house was what? A. To tell him I didn't take the gun.

Q. And it was then you urged him to report it to the police? A. That's right.

Q. On January 9, or the night of January 9, 1954, you were apprehended on Oak Street in your car— A. That's right.

Q. At which time you had this same gun on your lap? A. That's right.

Q. What were you planning to do with this gun? A. I was looking for the numbers on it.

Q. Why did you want to look for numbers on this gun? A. I just wanted to see if there was any numbers. I didn't see any on the butt. I wanted to see if there was any more on it.

Q. Hadn't you examined this gun previously? A. No.

Q. Was it that you were going to do a hold-up on Oak Street that night? A. No.

Q. Did you have any intentions of doing a hold-up? A. No. I didn't move my car on account of the ice on the ground. I had already smashed the grill in.

Q. Where else did you keep this gun? A. In the glove compartment, that's all.

Q. You didn't always keep it there, did you? A. When I got out of the car I kept it on my person. In the night time I would leave it in the car in the compartment.

Q. Has your wife ever seen this gun? A. No, I don't think so.

Q. Your wife looked in the glove compartment on occasion and didn't see the gun. Where would it be at that time? A. She never looked in it while I had it there.

Q. Well, where would it be if it weren't there when she looked? A. It never was in there when she looked. I never—last time she was in the car when we went down the Rock, last time she looked in the glove compartment to get salt out for her potato chips.

Q. Did you file the numbers off this gun? A. No.

Q. They were that way when you took it from the home of George Evans; is that right? A. Yes.

(A brief recess was taken at this time.)

Q. Showing you this picture, Harold, you have shown the cash

register on the left-hand-side of the counter as you enter and the table there. A. That's right.

Q. Where was Baby, or Dorothy, as you now know her, standing when the first shot was fired? A. Over here. (Indicating.)

Q. Whereabouts? A. Near the wall.

Q. Right near the wall on the right side near the counter? A. She had the telephone in her hand.

Q. She had the telephone in her hand? A. Yes.

Q. After the other shots were fired, where was she standing then? A. Back here near the cases.

Q. Are these the cases you have reference to? This is in back of the counter. A. They look like it.

Q. You recognize this clothing hanging on the door, that door going out? A. I didn't pay any attention to it.

Q. You didn't pay any attention to it? A. No.

Q. So you don't know where there was any clothes hanging there or not? A. No.

Q. But these look like the boxes here where she was? A. These over here look like it.

Q. On the right of this picture here, under the sign "P.M."? A. Yes.

Q. Harold, at the hotel where is the room of the woman you rented the room from when you come in the building? A. First floor front.

Q. First floor front. As you enter the building where is it, right or left? A. Right in front of the stairway. You come to the stairway and you go to the front of the building.

Q. Is that the room you had? A. Yes.

Q. No. When you rented the room from this woman— A. Yes.

Q. Where is her room? A. Downstairs somewhere, down on the ground floor.

Q. You know where on the first floor? A. I don't know. It seems like an apartment on the first floor.

Q. How did you meet her when you came in? A. She came to the door, near the outside door.

Q. Is it on the right or left? A. On the right-hand-side going in.

Q. And the stairway is there going up to the second floor? A. On the left-hand side.

Q. That's the staircase? A. Yes.

Q. How many rooms were on the front of the building? A. Two or three. I don't know how many.

Q. Which one did you have? A. The middle one.

Q. The middle one? A. Yes.

Q. You think there's three? A. I think so.

Q. What kind of furniture is in the room? A. Plain ordinary bed.

Q. How many windows? A. Two, I think.

Q. Is there a bathroom? A. I don't know where the bathroom is. I never used it. I think there's a bathroom in the back on the same floor.

Q. Did this woman have to go to the bathroom anytime she was with you? A. No.

Q. At no time? A. No.

Q. But she did stay all night a couple of nights? A. That's right.

Q. When she didn't stay all night, how early would she go home? A. Around 12 or 1 o'clock.

Q. You would take her home? A. That's right.

Q. And you would drop her off where? A. About half a block from the store, near the New Haven side.

Q. Do you know where she actually lived? A. No, I don't.

Q. Do you know that she lived a long distance from there? A. I don't know how far she lived from there. That's where she asked to be dropped off at.

Q. She asked you to drop her off there? A. That's right.

Q. And that's why you did? A. That's right.

Q. How much money do you think you paid rent up there under the name of Howard Johnson? A. I don't know. I paid ten dollars a week for about five months.

Q. Do you have any rent receipts? A. No.

Q. Did you have any? A. Uh-uh.

Q. What day of the week would you pay the woman? A. Saturday.

Q. Every Saturday?—A. Yes.

Q. But she never gave you a receipt? A. No. I never asked her for none.

Q. You gave this up how long after the shooting on November 21? A. Right after then. Next day, I think.

Q. How did you do that? A. I just moved out and didn't say nothing.

Q. Where did you take your things? A. I didn't have nothing there.

Q. Did your wife know about this room you had there? A. No.

Q. Now, I want you to think of anyone who might have seen you two together at any time. A. I don't remember nobody.

Q. Did you ever tell anyone that you were having an affair with this woman? A. No.

Q. Harold, the statement you have just made concerning your affair with this woman Baby, as you call her, is not one that is made up— A. No, that's all true.

Q. It's true? A. That's right.

Q. You didn't make this up to cover a hold-up that you did? A. No, no.

Q. And the events you speak of here actually happened? A. That's right.

[The aforesaid Harold D. Rogers thereupon made oath to the truth of the foregoing statement before me, Robert R. Lyman, a Notary Public in and for the State of Connecticut.]

RESPONDENT'S EXHIBIT AC FOR IDENTIFICATION

INTERROGATION OF HAROLD D. ROGERS CONDUCTED BY CORONER JAMES J. CORRIGAN AT THE NEW HAVEN COUNTY COURT HOUSE ON THE AFTERNOON OF SUNDAY, JANUARY 31, 1954

ROBERT R. LYMAN
Shorthand Reporter
County Court House, New Haven, Conn.

(Harold D. Rogers, being first duly sworn, testified as follows:)

Interrogation by Mr. Corrigan.

Q. What is your name? A. Harold D. Rogers.

Q. Where do you live? A. 704 Orchard Street

Q. Orchard Street? A. Yes.

Q. In New Haven? A. Yes, 704.

Q. How old are you? A. Forty-six.

Q. Well, now, I think you probably have been told that I am coroner for New Haven County. Has anybody told you that? A. No.

Q. Well, I am. I am James J. Corrigan, coroner for New Haven County. You know what a coroner is? A. He tells whether a person is dead or not.

Q. He does a little more than tell whether a person is dead or not. It's my duty to investigate all sudden, violent and untimely deaths. Now, I'm conducting an inquest into the death of Dorothy Kennedy, who was shot in her husband's liquor package store in West Haven on the night of November 21 last. I'm informed that you admitted that you shot that lady.

Now, I'm going to ask you some questions concerning that case, and I want to warn you that you're under no duty to answer them if you don't wish to. Nobody may be forced to give evidence against themselves. I think you're acquainted with that

law in a general way. It's also so that you are entitled to be represented by counsel if you wish to. Now, if you do talk to me, you will do so on a completely voluntary basis, just because you choose to do it. Whatever you say may be held against you. You may be charged with the commission of some crime as a result of this episode, and if you are so charged I can't promise you any reward or immunity from punishment by virtue of or for the reason of your saying anything you wish to or testifying as you choose to.

Do I make myself quite clear now?

A. I understand.

Q. How old did your say you are? A. Forty-six.

Q. Have you been employed recently? A. Yes, I was employed up to two weeks before I got locked up for the burglary charge.

Q. That's in connection with the Travelers? A. Yes.

Q. Well, now, I'm going to ask you the direct question: On November 21 last did you shoot and kill Dorothy Kennedy? A. Yes.

Q. What time did that shooting take place? A. Around 7:30 or 8 o'clock.

Q. Where did it take place? A. In the package store.

Q. That's located on Orange Avenue in West Haven; is that right? A. I don't think it's Orange Avenue. Ocean Avenue.

Q. Ocean Avenue, I'm sorry. That was a slip of the tongue. Yes, Ocean Avenue. You know the number? A. No.

Q. Well, now, instead of my asking you questions I wish you would go ahead and tell me a connected story, developing this whole thing. A. Well, I had been going with her about five or six months—

Q. You had been going with her? A. Yes, about five or six months.

Q. Yes. A. (Continuing)—and I used to get money from her anytime I needed it. I went out there to ask her for twenty-five dollars, and she called me a black son-of-a-bitch and said she was tired of giving me money, all I wanted was money, and she gripped my hand here and slapped my face twice.

Q. You still bear a scar on the back of your left hand? A. They took a picture of it at the county jail today.

Q. The last think you said was, "She called me a black son-of-a-bitch and said 'All you want is my money'." A. Yes.

Q. And did you say she used to give you money? A. Yes.

Q. What did she give you? A. Fifty dollars, twenty-five dollars, thirty-five dollars. Five or six times she gave me money.

Q. So what happened after that? A. Well, we got to fighting. After she slapped me I shoved her over on the cases, and she come up and slapped me again and we got fighting, and that's about when the gun went off. I had the gun in my waist. Whenever I got out of the car I put it in my waist.

Q. Well, when she said that to you, did she slap you or— A. She slapped—

Q. (Continuing)—or did you strike her first? A. She slapped me first and I shoved her on the boxes.

Q. You shoved her onto the boxes? A. That's right, the beer boxes, beer cases.

Q. Yes. Then she came after you and slapped you again? A. Scratched me first and then slapped me again.

Q. She scratched you? A. Yes, and she slapped me again. I never hit her at all. I just shoved her.

Q. Yes. A. Then she went for the telephone, and I guess that's when I shot her.

Q. Before you shot her didn't you strike her with the butt of the gun? A. Yes, across the head. I didn't want to shoot her.

Q. At just what point was it you struck her with the gun? A. I tried to push her away from the phone, and she lunged at me again and I hit her across the head with the butt of the gun two or three times.

Q. Did that knock her to the floor? A. No. She still come after me.

Q. Then what happened? A. Then she went for the telephone, and I guess that's when I shot her.

Q. Well, why did you shoot her? A. I don't know. I didn't mean to shoot her. I tried to knock her out first. I got excited, I guess.

Q. Why did you even want to knock her out? A. Because she was fighting me. She wanted to call the police. I had been there about an hour before the argument started. A fellow come in and bought a fifth of whiskey, and we drank pretty near a fifth between the two of us. Part of the whiskey was left on the floor about that much, in a fifth bottle. (Indicating.)

Q. You indicate about two inches in the bottle? A. About an inch and a half or two inches.

Q. Did you drink it straight or with soda? A. Drank it with Seven-Up.

Q. You chased it with that or mixed it? A. I chased it with it.

Q. She did, too? A. She drank her's straight. She was pretty high when I come in there. She had the fifth bottle already open, sitting on the floor. She was eating a sandwich and drinking the whiskey.

Q. How many times did you shoot her? A. I don't know. Three or four imes, I guess.

Q. Do you know how many shots in all were fired? A. I don't know. To be exact, I don't know.

Q. Was three or four the total number of shots fired or are those the ones that hit her, in your opinion? A. I don't know how many I fired.

Q. Do you think they all hit her however many you did? A. I don't know. I shot a couple over her head, I think.

Q. Where was she and where were you when the shooting took place? A. She was standing near the telephone and I was right near her.

Q. As you go into the store from Ocean Avenue, is the telephone at the left or at the right? A. At the right-hand-side of the counter. The counter goes straight across the front of the building. The cash register is on the left-hand-side of the counter and the telephone is on the right-hand-side of the counter.

Q. As you face it from the street? A. That's right, as you come from the street.

Q. To get behind the counter you have to enter it from near the cash register on the left-hand-side? A. (Indicating) Right there at the table.

Q. Was she behind the counter all that time? A. She was sitting at the table when I went in.

Q. She was sitting at the table when you went in? A. Yes.

Q. Where is the table? A. Right near the back of the counter, on the left-hand corner of the store. It's almost in the back of the store, near the side wall.

Q. She was sitting on the table? A. At the table, on a wire bottom chair. The legs of the chair were wire.

Q. You spent about an hour in there, you said? A. That's right.

Q. What did you sit on? A. I didn't sit on nothing. I was standing—leaning on the table half of the time.

Q. Were you standing up when you shot her? A. Yes.

Q. Was she standing up? A. That's right, both of us standing up.

Q. How far away from her were you when you shot her? A. About three or four feet, I guess. Maybe about five feet altogether.

Q. You know where the first bullet hit her? A. No.

Q. You know where the second one hit her? A. I don't know where any of them hit her because she was standing up when I went out of the store.

Q. Was she facing you? A. Yes, she was facing me when I went out of the store.

Q. How about when you shot her? A. She was facing me then.

Q. Did she make a telephone call? A. I don't know if she made it or not. I don't know if she got a connection or not. I pushed her away from the—the telephone receiver dropped out of her hand and she laid against the boxes, and she straightened up again, and I took the money out of the cash register and left out of there.

Q. How much money was in the cash register? A. About sixty dollars including the change.

Q. Did you get all the money out of the cash register? A. I don't know.

Q. Do you know whether you dropped any on the floor? A. I don't know. I don't remember.

Q. Well, can you say that you didn't leave any bills? A. I took all the bills, I think.

Q. And if you left anything it was change? A. Silver.

Q. You don't remember the silver falling on the floor? A. I don't remember that.

Q. Well, now, let's go back to this question as to whether she had succeeded in making the telephone call or not. A. I don't know whether she got any or not. She said, "I'm being killed."

Q. You don't know whether there was anybody at the other end to hear that? A. No, I don't know.

Q. Do you know the man who came in while you were there? A. I don't know. He come from across the street somewhere. He had no overcoat on. He had a dark suit on. He had a slouch gray hat on. He come from across the street on an angle. He may have come from a few houses down the road somewhere. The houses were mostly on the other side of the street.

Q. When you say he came from an angle, you put up your right hand to indicate he came from the direction— A. From toward Milford way. Coming back to West Haven way.

Q. What did he buy? A. I don't know exactly what he bought. Whiskey with a black label on the bottle. I don't know what kind of whiskey it was. Had a black label on the bottle.

Q. What kind of whiskey were you and she drinking? A. Imperial.

Q. Was that your choice or hers? A. Hers, because I drink Seagram's Seven all the time. She had it open when I went in there.

Q. Did you have an appointment with her that night? A. No. I went out there to get some money—borrow some money.

Q. Did you call her up? A. No.

Q. Do you know her telephone number? A. No.

Q. Did you ever call her up? A. No.

Q. Can you tell me any more about this man that had the gray slouch hat and dark suit on? A. All I know, he come in and bought the fifth of whiskey and went right out before we started the argument.

Q. About how old a man was he? A. About his size. (Indicating.) I told him the other night.

Coroner CORRIGAN. Indicating Captain Walsh.

A. (Continuing) I imagine he was about fifty-five or sixty years old. Something like that.

Q. With what kind of gun did you shoot her? A. 38 police special Smith & Wesson.

Q. Where did you get the gun? A. I got it at my nephew-in-law's house.

Q. What is his name? A. George Evans.

Q. Where does he live? A. 5 Admiral Street.

Q. In New Haven? A. That's right. Up near Winchester's.

Q. When did you come into possession of the gun? A. About the 20th of November.

Q. That was the day before this shooting? A. That's right.

Q. Did you steal the gun from George Evans? A. I took it. I didn't think I stole it. I just took it. I had freedom of the house to take anything I wanted out of there.

Q. He didn't know you had it, though? A. No.

Q. Well, this shooting was on the 21st of November, a Saturday. You think you took the gun the day before, on Friday. What time of day was it? A. In the middle of the day. I went there to get something to eat. I was painting on Beers Street—painting a house on Beers Street for Armond McCoy, the real estate agent.

Q. Did you take the gun back to the job with you? A. That's right.

Q. Where did you keep it? A. In the glove compartment of my car.

Q. And then when you went home from that Armond McCoy job that night— A. I left it in the car, in the compartment.

Q. And then did you work Saturday? A. Yes; I worked Saturday.

Q. Until what time? A. Until about from 8 o'clock until about 6 o'clock.

Q. Were you working at Armond McCoy's Saturday? A. Yes, I was. Saturday I worked, too, because I was out there about 6 or 6:30. I quit Armond McCoy's and went out there.

Q. While you were working on the McCoy job where was the

gun? A. In the glove compartment. The car was right in front of his house.

Q. On Admiral Street? A. No. 98 or 89 Beers Street. Runs from—

Q. Yes, I know. A. Right near the school.

Q. So you went directly from McCoy's out to the Kennedy place? A. That's right.

Q. Didn't you get paid on Saturday? A. No. I owed him five hundred dollars. I just bought a house last May and I owed him five hundred dollars and I was working it out for him.

Q. Now, what time do you think you arrived at Kennedy's? A. Around 6:30 or 7 o'clock. Somewhere around there.

Q. Was Mr. Kennedy there? A. No; he goes home for supper.

Q. You knew that, did you? A. Yes, I knew it from a long time.

Q. Did you know him at all? A. No, I never seen him. She told me what time he went home.

Q. Where did you have this gun when you were in Kennedy's? A. In my waist here. (Indicating.) I never left it in the car when I got out of the car. When the car was parked in the street, I never left it in the car. When I was walking around the street I carried it in my waist, right here.

Q. When did you take it from the glove compartment and put it in your waist? A. When I parked the car across the street.

Q. When you parked the car across the street from Kennedy's? A. That's right.

Q. Was it your idea if she wouldn't give you the money you wanted you would shoot her? A. I never had no intentions of shooting her. I had been there too many times. I never knew she was going to refuse me.

Q. What did you take the gun out for then? A. I never kept it in the car when I had the car parked in the street. I always carried it in my waist.

Q. Why? A. I was scared somebody may break in the car and take it.

Q. How did you become so friendly with Mrs. Kennedy? A. I was going by one day and she sort of smiled at me. The next

time I went by there I stopped and bought a half pint of whiskey and she started talking about friendships, so I told her I could be a friend, and one thing led to another. About three weeks later I took her out.

Q. Where did you take her? A. Took her up Dixwell Avenue, up to the Nelson Hotel.

Q. Do you know what date that was? A. No, I don't know what date it was.

Q. Approximately when? A. Must have been around in June sometime.

Q. Around June. That was three weeks after this smiling incident; is that right? A. About three or four weeks, because I went back next week and bought a half pint of whiskey.

Q. And then it was three weeks after that? A. About three weeks after that.

Q. Did you have any conversation concerning her husband that first day? A. No, I didn't have no conversation.

Q. Well, did you at any later time have any conversation? A. Yes, after a while, two or three times later she started speaking about her husband was no good to her physically.

Q. Did you say anything as to that? A. I didn't answer her. I didn't say nothing to her.

Q. Did she tell you why he wasn't any good to her physically? A. She said he ran around.

Q. With other women? A. I guess so. I guess that's what she meant.

Q. So sometime about June you took her to the Hotel Nelson on Dixwell Avenue? A. That's right.

Q. Do you know the day of the week that was? A. About the middle of the week. We left there about 9:30.

Q. You left where at 9:30? A. Ocean Avenue.

Q. The package store? A. That's right. She closed the package store up and I brought her uptown in my car.

Q. Were there just the two of you or was there a bigger party? A. No, that's all, just the two of us all the time.

Q. Did you register in the Hotel Nelson? A. I had a room there.

Q. By the week? A. Yes.

Q. How much did that cost you? A. Ten dollars a week.

Q. Could you take her to the room in the Hotel Nelson? A. I wasn't supposed to. I used to sneak her in.

Q. Well, what did you do on this first occasion? A. We took some whiskey with us and then went to bed.

Q. You had intercourse with her? A. That's right.

Q. What time did you leave? A. Maybe about 11:30 or 12 o'clock.

Q. The same night? A. That's right.

Q. So you were with her only for an hour or an hour and a half there? A. That's all.

Q. How many times did you have intercourse with her? A. About five or six times.

Q. You mean all in that one night? A. No, no.

Q. You mean altogether? A. Different occasions.

Q. You had intercourse only once that first night? A. That's right.

Q. Did it require considerable persuasion on your part to get her to go to bed with you? A. No. She knew what she was going for.

Q. How did she know? A. We talked about it in the store before she left.

Q. What did you have to say? A. She wanted me to take her uptown and have some good time, she said.

Q. Did you see anybody you knew when you went into the Hotel Nelson? A. No, I never saw nobody.

Q. Nobody ever saw you two together? A. No, not that I know of. I never told nobody about it. Nobody ever mentioned it to me.

Q. What kind of car do you have? A. '49 Buick sedanette, two-door.

Q. Is that the car in which you took her on these dates? A. That's right. I had it two years or about a year and a half. Something like that.

Q. After leaving the Hotel Nelson about 11 P. M. where did you go? A. I brought her back down to Ocean Avenue, up about

a block or so from the package store. She asked me to let her out there and she would walk the rest of the way, she said.

Q. The rest of the way where? A. Home, I guess.

Q. Where did she live? A. I don't know. She never told me. I never asked her.

Q. When is the next time you saw her? A. About two or three weeks later.

Q. How did that come to pass? A. I went out there to get some more money.

Q. Did she give it to you? A. She give me fifty dollars.

Q. Did you take her out that night? A. Yes. I took her back up to the hotel again.

Q. And you had intercourse with her? A. That's right.

Q. How long did you stay that night? A. Stayed practically all night. Come back about 4 or 5 o'clock in the morning.

Q. How many times did you have intercourse with her? A. About five or six times.

Q. I mean that night. A. About two times, three times.

Q. Did she make any comparison between you and her husband along those lines? A. No.

Q. Did she ever tell you she loved you? A. Not exactly.

Q. Did you ever tell her you loved her? A. No.

Q. You're married, aren't you? A. That's right.

Q. Are you supposed to be living with your wife? A. I am living with her—was living with her.

Q. But she ddin't live at the Hotel Nelson? A. No.

Q. That was just your hide-out; is that it? A. That's right.

Q. Let's get back to November 21, the night of the shooting. You said you think you shot her three or four times?

A. That's right.

Q. And what was the statement that you heard her make over the telephone? A. "I'm being killed."

Q. Now, after that what did you do? A. I pushed her away from the telephone.

Q. Pushed her away from the telephone? A. Yes.

Q. Then what happened? A. She went back to the telephone again and started to grab it, and that's when I shot her, I guess.

Q. Well, is the sequence of events that you first struck her with the gun and she went to the telephone and said "I'm being killed"? A. That's right.

Q. Then you pulled her away from the telephone? A. That's right.

Q. And then she struggled out of your clutch? A. That's right.

Q. And went back to the telephone? A. That's right.

Q. And that's when you shot her? A. That's right.

Q. What did you do then? A. I took the money out of the cash register and left out of there.

Q. Did you do anything to the telephone yourself? A. No, I didn't touch it. I never had my hand on it.

Q. You sure you didn't pick up the telephone and ask if the police were on the way? A. No, I didn't touch the telephone.

Q. Think about that for a minute. A. I didn't touch the telephone.

Q. You sure you didn't say anything at all? A. I didn't touch the telephone. I didn't go nowhere near the telephone, only to shove her away from it.

Q. Something else. Before you left there did you do anything about the Imperial whiskey bottle? A. No, I left it on the floor.

Q. How about the sandwich? A. The sandwich was laying on top of the table where she left it. It was a piece of sandwich.

Q. What kind of sandwich was she eating? A. I don't know. Looked like it was made out of a bun, it looked like.

Q. You know what the filler was? A. I don't know what it was. Some kind of meat was inside of it, like cold-cut.

Q. You say she was eating that sandwich when you went in there? A. That's right. She was sitting back of the table eating the sandwich and had some whiskey poured in a glass.

Q. Then you didn't get her the sandwich? A. No, no, she had the sandwich when I went in there.

Q. Did she ever borrow any money from you? A. She borrowed two hundred dollars from me.

Q. When? A. When I first started going with her. She said she had a bill to pay.

Q. Was this before you ever had intercourse with her? A. After the first one.

Q. She said she had a bill to pay? A. Yes, she had to pay it right away.

Q. Did she tell you what kind of bill it was? A. No.

Q. You know whether it was a liquor bill? A. I don't know what kind of bill it was.

Q. Did she pay that back to you? A. She paid it back to me, yes.

Q. When? A. About a month later.

Q. Did you ever discuss with her that her husband would want to know the source of this two hundred dollars? A. No, I never—it never occurred to me.

Q. Where did you get that two hundred dollars? A. I had it off my job. I had extra jobs outside. I worked for Whipple. He's got a machine shop in North Haven. He built a house in Mansfield Grove and I laid the brick on the outside of the house, four hundred dollars worth of brick.

Q. How much did you get for that? A. Four hundred dollars for the whole job.

Q. Did you get it all at once? A. No, I got it in about three payments.

Q. Did you carry this money on your person? A. Most of the time.

Q. And you let it accumulate so you could spare two hundred dollars; is that right? A. That's right, with my job I had for Patterson. I worked over here in the bank.

Q. For the Patterson Construction Company? A. That's right. That was my regular job. Painting and stuff was on the outside. That was outside jobs, like Saturdays and Sundays, like that.

Q. Did you sit in your car and wait until her husband left on the night of the 21st? A. No, he already left. I went by the store and saw he had gone.

Q. You think that was about 6:30? A. About 6:30 or 7 o'clock, somewhere around there.

Q. Had you had anything to drink yourself before that? A. Yes, I drank a pint of whiskey down Oak Street—a half pint of whiskey I bought down Oak Street.

Q. What happened to it? A. I drank it up before I left Oak Street.

Q. You said she had been drinking before you arrived? A. That's right. The fifth had already been opened.

Q. That's how you knew she had been drinking? A. She was half high when I went in there.

Q. How could you tell? A. By the way she talked.

Q. Were you perfectly sober yourself? A. Well, I drank half a pint of whiskey about an hour before then.

Q. Well, you were in good enough shape so you knew she was high; is that right? A. That's right.

Q. Would you say you were in complete possession of your faculties? A. I don't know exactly. I wasn't drunk.

Q. You knew everything you were doing? You had good judgment about what she was doing; is that right? A. Yes, I guess so.

Q. What did you do with the gun? A. Took it down and put it in my glove compartment and left it in there.

Q. You left it in the glove compartment? A. That's right.

Q. Did anything happen in connection with the gun thereafter? A. Well, I got locked up for burglary on Water Street—Meadow Street.

Q. Well, before that was there something to do with the gun? A. No.

Q. Did your nephew discover that the gun was gone? A. Yes, the following Saturday, I think.

Q. You mean a week later? A. No, the same week. He come down to the detective headquarters the 25th of November—the 25th or 24th or somewhere around there.

Q. The 21st was Saturday. A. He come down the 22nd, then. He come down on Sunday and reported the gun missing, because I brought him down.

Q. You brought him down to the detective bureau? A. That's right.

Q. What was the idea of doing that? A. He had—the gun was registered in his name.

Q. Why did you take him to the detective bureau to report that it was stolen? A. I didn't want him to think I took it.

Q. Did you ever tell him to this day? A. No.

Q. Did you do anything to disguise the identity of the gun? A. No, I didn't do nothing to it.

Q. How about the number on it? Is that still on it? A. No number on the butt.

Q. What happened to it? A. Looked like it had been filed off.

Q. Who did that? A. I don't know.

Q. Do you deny you did it? A. I deny I did it, yes.

Q. Do you claim that it was off when you first got the gun? A. I imagine so. I didn't look at the gun good. I only seen the gun one time before.

Q. Where was that? A. In his house. He showed it to me.

Q. Where did you get the bullets you used? A. Got them out of his drawer in the dressing table—in the night table.

Q. Was there a whole box of them there? A. Whole box of cartridges, yes.

Q. Was the gun empty when you took it? A. That's right.

Q. When did you load it? A. In front of the house, in the car.

Q. Do you mean Friday noon, when you first took it? A. That's right.

Q. How many bullets did you take altogether? A. Six or eight. Something like that.

Q. How many would the gun hold? A. Six. I found out it was six afterwards. When I loaded it I found there was six in it.

Q. Did you have some loose bullets in your pocket on the night of the 21st? A. I had two in the compartment.

Q. Two in the glove compartment? A. Yes.

Q. After firing three or four shots at Mrs. Kennedy did you reload the gun? A. I dumped the other bullets out and threw them away.

Q. Even the good ones? A. I don't know whether any was good or not. I dumped all of them out except one. One had a head on it.

Q. By a head, you mean only one had a projectile in it? A. Yes, that's right.

Q. The rest had already been fired? A. Looked like it.

Q. And you kept that good one and replaced the others? A. That's right.

Q. Where did you dispose of those empty shells? A. I don't know whether I threw them in the sewer or threw them in the ocean. I don't know where I threw them at.

Q. How is it your memory isn't so good as to that and it's very good as to other details? A. I don't remember exactly. I think I threw them in the sewer somewhere.

Q. But you don't know where? A. I don't know exactly where.

Q. Now, is this the same gun you used in the Hotel Travelers job? A. Yes.

Q. Had you been on other jobs, too? A. No.

Q. Did you use the gun between the Kennedy job and the Travelers job? A. I didn't use the gun on the Travelers job. The gun was never fired after I reloaded it.

Q. But you always carried it in your belt when you were out of the car? A. That's right, when the car was parked in the street away from home. I only left it in the car when the car was parked in the backyard, night time.

Q. Did Mrs. Kennedy customarily lock the place when she relieved her husband there at night? A. No.

Q. Did he usually come back and lock up? A. I don't know whether he would come back or not. Sometimes, maybe, he come back. I never seen him come back. Every time I brought her away she locked up.

Q. Do you know whether he had intended to come back on this particular night? A. I don't know. He's supposed to have went home for supper. I guess he was coming back in an hour or so, or two hours. Something like that.

Q. Weren't you afraid he would come back and find you there? A. I only stayed there about an hour. He just left a little while before I got there.

Q. Did she tell you that? A. That's right.

Q. Did you see her purse on the night of the 21st? A. No.

Q. You have no idea whether she had a purse with her or not? A. She used to keep it hung up on the door most of the time. I didn't see it.

Q. How did you open the cash register? A. I pressed one of the buttons down.

Q. I suppose if you knew her bag was there with money in it you would have taken that? A. No, I wouldn't: I didn't want but twenty-five dollars. I wanted to borrow it. I didn't go to steal nothing.

Q. But you did take sixty dollars? A. Yes, after I opened the cash register.

Q. What did you want twenty-five dollars for? A. I wanted to get in a game.

Q. A crap game? A. That's right.

Q. When was it that you did that work for Whipple at Mansfield Grove? A. Must have been just before it got cold, before it got real cold. I finished it up around the last of November, first of December. I was over there about three weeks.

Q. Last of November or first of December what year? A. Last year, 1953.

Q. You told me before you first had intercourse with her in June, 1953. A. That's right.

Q. And you told me you lent her the two hundred dollars between the first and second dates? A. That's right.

Q. So, if you lent her the two hundred dollars between the first and second dates and you shot her on November 21, you couldn't have gotten that money from— A. I didn't tell you I got it from Whipple's job. I said I got it off my jobs. I said I let the money accumulate. I didn't say I got that money. I gave her off Whipple's job. You asked me how many times he paid me and I said about three or four times.

Q. And that's when I asked you if you carried the money with you all the time and you said yes, usually. A. Yes, that's right.

Q. And I asked you if you just let that accumulate until you had about four hundred dollars so that you could spare her two hundred. A. Not that money. You didn't ask me if it was that money.

Q. Well, I'll ask you now, then: Where did you get this money to lend her two hundred dollars? A. Off my jobs. Extra jobs I did on Saturday and Sunday.

Q. Well, the Whipple job wasn't one of those, then? A. That's right.

Q. While this was going on on the 21st where was your car? A. About three doors down on the opposite side of the street, facing Milford.

Q. Further toward Milford or further towards New Haven? A. Further towards Milford.

Q. And it was facing Milford? A. That's right.

Q. And your registration number is what? A. CZ 488.

Q. About how long did this fight last from beginning to end? A. I don't know. It couldn't have lasted too long. Maybe about ten minutes or so.

Q. When you first went there you didn't ask her to let you have the twenty-five dollars? A. No, she was drinking. I started drinking with her.

Q. So you didn't mention the twenty-five dollars? A. Not until after the guy bought the fifth of whiskey.

Q. What was there about his buying the fifth of whiskey that caused you— A. That's what I went out there for, to ask her to borrow it.

Q. Yes. A. But I hadn't got ready to ask her yet. She knew I was coming for money. That's the only time I came out there most of the time.

Q. Did you tell her if she didn't give you the money you would inform her husband of the affair between you? A. No.

Q. There was some talk along those lines, wasn't there? A. No, never. I never knew her husband, never seen him. I couldn't tell him nothing. I didn't know who he was. I never seen him. I wouldn't know him if I fell over him. I don't think he ever seen me neither.

Q. Did you see anybody when you left the place? A. No.

Q. You went over to your car— A. Got in it and rode down the street, made a U-turn and come back up Ocean Avenue.

Q. You made the U-turn at— A. The next street down. The first street you come to down there going toward Milford.

Q. At Nashawena? A. I don't know the name of the street. I went the first block and made a U-turn.

Q. There's a street called Hubert Street that's almost opposite the Kennedy place just a little further towards Milford. A. That's the street I turned into, the first street you come to. Runs from the beach up that way, up the hill. Goes up a grade.

Q. You could have been parked a little beyond that street towards the Milford side and— A. I turned up the first street from my car. I don't know the name of the streets down there. First street going towards Milford from my car I made the U-turn.

Q. Do you know whether you had your car parked beyond that little street that's almost opposite the package store? A. I was about three or four houses down from the package store. I don't know what street it was. It was dark out there anyway.

Q. Well, you can't tell me now whether your car was west or beyond that Hubert Street? A. My car was facing Milford.

Q. I know it was. A. It was about thirty or forty feet from the next corner, and I went down to that street, turned around, and come back. Must have been about three or four houses from the package store on the other side of the street.

Q. Well, the package store faces— A. Ocean Avenue.

Q. Yes, and just about opposite it there is the space between the house at the corner of Hubert Street and the next one from it towards New Haven. That's all the houses that there are before you get to Hubert Street. A. I parked about three or four houses down from the store. I don't know whether I crossed the street or not.

Q. So then you turned around, and what did you do? A. I come back up Dixwell Avenue and parked at the corner of Gregory and Dixwell Avenue.

Q. Did you see anyone you knew there? A. No.

Q. Well, what did you do? Just sit in the car? A. Until about 1 o'clock, and then I went home.

Q. Well, what time did you get to the corner of Gregory and Dixwell Avenue? A. I don't know. Must have been about 9 or 10 o'clock. Something like that.

Q. Do you mean you just sat in the car and did nothing? A. That's right, sat in the car about two hours.

Q. Did you see anyone or did anyone see you while you were sitting there? A. No, I didn't see nobody and I don't think

nobody seen me, because I was parked off the corner on Gregory Street near Shifrin's market.

Q. Were you between Dixwell Avenue and Ashmun Street? A. Yes. Gregory Street don't go no more all the way to Ashmun Street. The school stops it. I was between Dixwell Avenue and the school. I was near Dixwell Avenue.

Q. Were you facing the school? A. Facing Dixwell Avenue. I went down to the school and turned around and come back to Dixwell Avenue, right beside Shifrin's store.

Q. How many different times did you take Mrs. Kennedy to the Hotel Nelson? A. About five or six times, maybe.

Q. Is that the only place you ever had intercourse with her? A. That's right.

Q. Huh? A. That's right.

Q. And is it so that every time you did take her there you did have intercourse with her? A. Yes, every time.

Q. And sometimes more than once? A. Sometimes stayed practically all night, two or three times.

Q. Each time you saw her did you make a date with her for another time? A. Not every time. Sometimes I would go down there and she would be waiting.

Q. You say she would be waiting? A. I would go down about almost closing time. If nobody was there, I would go in the store.

Q. Now, on Friday, the 20th of November, the day before this shooting, you went from your job to your nephew-in-law's house? A. That's right.

Q. To get something to eat primarily? A. That's right.

Q. And you took the gun while you were there? A. That's right.

Q. Why did you take the gun? A. I wanted it for a long time. That's the first chance I had to take it.

Q. Why did you want it? A. I just wanted it, that's all.

Q. You certainly had something in mind as to why you wanted it. A. I just liked the gun, that's all.

Q. People don't go down picking up guns that don't belong to them just because they like guns. What did you want it for? A. I didn't want it for nothing in particular. I didn't have nothing in view when I took it.

Q. It's extra weight to carry around if you don't have any purpose for it. I don't understand it. A. Well, that's what it is.

Q. You're sure you didn't get that gun for the very purpose of holding that Kennedy place up? A. No, no. I never held the place up. I never had no intention to holding the place up. I got money from her too often to hold the place up. First time she refused me.

Q. Is there anything you would like to add that I haven't asked you? A. Nothing. I don't think so.

Q. You don't know the name of this man with the dark suit and gray hat that came in that night? A. No. First time I seen him.

Q. Did you on other occasions, when you were there, see anybody come in? A. Yes. I set there two or three times and seen people come in.

Q. Do you know any of their names? A. I don't know. White people.

Q. Were they all men? A. One time a man and woman come in together. Most times men come in.

Q. When was it that the man and woman came in together? A. I don't know the exact date.

Q. No, but approximately. A. I couldn't tell you that now to save my life.

Q. How many times altogether did you see people come in that place while you were there? A. Maybe three or four times.

Q. And all of that was between June and November? A. That's right.

Q. Did you ever spend as long as an hour in there before the 21st of November? A. Sure, lots of times. Two or three times at least. We drank there a lot of times together.

Q. Well, there must have been many people that came in and out if you spent an hour there on three previous occasions. A. Not many people come in that store. Nobody comes in that night the accident happened except one man. He come in before it happened.

Q. Their business wasn't very thriving. A. Didn't seem to be. Not the time I was there.

Q. When you hit her with the gun was she screaming? A. No.

Q. She did scream though, didn't she? A. Yes, after I shot her.

Q. Not until after you shot her? A. That's right.

Q. Was she screaming when you left the place? A. No.

Q. You said she was still standing up; is that right? A. Yes, that's right.

Q. Did you tell her you would shoot her again if she attempted to follow you? A. No.

Q. Did she attempt to follow you? A. No, she was leaning against the boxes.

Q. Did you run to your car? A. I guess I walked kind of fast, but I don't think I ran.

Q. How were you dressed that night? A. I had a pair of brown pants on and jacket—three-quarter jacket.

Q. What kind of jacket? A. A blue jacket.

Q. A zipper jacket? A. That's right.

Q. By a three-quarter jacket you mean it came below your hips? A. Just below my hips. (Indicating.)

Q. Did you have a hat on? A. No, I never wore a hat.

Q. Whereabouts on Oak Street was it you bought this half pint? A. Just before you get to Factory Street there's a little, small package store there.

Q. Just before you get to Factory Street going towards Congress Avenue? A. That's right.

Q. And it's on the left-hand-side? A. On the left-hand-side going towards Congress Avenue.

Q. Who runs that package store? A. Some Jewish fellow. I don't know who runs it. I saw a Jewish fellow in there all the time.

Q. Is it a place you patronized regularly? A. No.

Q. Didn't you just say you saw a Jewish fellow— A. That's right. I'm down there a lot.

Q. Then you have patronized— A. I see him in there. First time I ever bought a half pint of whiskey in there was that night. I used to go in Sophie's all the time, the tavern.

Q. Were you alone that night except when you were with Mrs. Kennedy? A. That's right.

Coroner CORRIGAN. All right. That's all we want on the record.

(Whereupon the taking of testimony was concluded.)

RESPONDENT'S EXHIBIT AD FOR IDENTIFICATION

The

SUPREME COURT OF ERRORS

of the

STATE OF CONNECTICUT

NEW HAVEN COUNTY

NOVEMBER TERM, 1954

4082

STATE OF CONNECTICUT

vs.

HAROLD D. ROGERS

BRIEF OF STATE OF CONNECTICUT-APPELLEE

To be argued by:

ABRAHAM S. ULLMAN,
State's Attorney.

STATEMENT OF FACTS

On the evening of November 21, 1953, Dorothy Kennedy was shot and killed by the defendant in her liquor store in the Town of West Haven. Earlier that day the defendant, having decided to procure money by means of robbery, stole a revolver and eight cartridges from the home of his nephew. Directly after leaving his nephew's home he loaded six cartridges into the gun and purchased a half-pint of whiskey at a store in New Haven.

After consuming a portion of the liquor, defendant drove to West Haven and parked his car opposite the store of decedent. Entering the store, defendant asked decedent for a half-pint of liquor and thereupon produced his gun and announced his purpose to commit robbery. As decedent ran to the telephone, defendant followed her behind the counter and struck her on the head with the butt-end of his gun. He then fired five shots at deceased, two of which struck her and resulted in almost immediate death. The defendant then removed the cash amounting to Sixty Dollars from the cash register and drove off.

Defendant's nephew in the meantime, having discovered the loss of his gun, sought out defendant and charged him with taking the gun. The defendant, however, steadfastly denied stealing it whereupon both men went to Police Headquarters and made official report of the loss of the gun. Thereafter the defendant kept the gun in his possesstion but endeavored to conceal its identity by filing off the serial numbers.

On January 9, 1954, defendant was arrested by the New Haven Police on charges of Attempted Robbery, Breaking and Entering, and Theft, committed that day at the Travelers Hotel. As the officers made the arrest, they observed the defendant try to hide a gun under the automobile seat. On being questioned he claimed that he had just won the gun in a "crap game" that afternoon, but in further questioning the following day he admitted stealing it from his nephew's home.

On January 13, 1954, the defendant was presented in the City Court of New Haven on the Travelers Hotel charges and was

bound over to the April Session of the Superior Court and in default of bail was lodged in the County Jail.

On the morning of January 30, 1954, ballistics tests conducted by the State Police established that the bullets recovered from the Kennedy murder scene were fired by the gun found in the possession of defendant. Thereupon about noon that day, defendant was brought to the State's Attorney's Office and made a statement wherein he admitted killing the deceased (Exhibit VV) and on the following day again made a confession under oath at the Coroner's inquest (Exhibit WW).

The truth of these statemens, insofar as they relate to the killing of the deceased by the defendant, was not disputed by any witness at the trial and in his Claims of Proof on this appeal the defendant makes no claim that his statements admitting the shooting of Mrs. Kennedy are untrue.

CORRECTIONS TO THE FINDING

ASSIGNMENTS OF ERROR VI AND XI

In these assignments defendant claims that the Court erred in finding as a fact that no appearance had been filed by any attorney for the accused in the Superior Court proceedings (Finding Pars. 78 and 109). The Superior Court file discloses that no appearance was entered and in his argument defendant concedes this fact, seeking merely to avoid it under cover of P. B. Rule Sec. 338. It should be noted however that this rule did not preclude his entering appearance in the Superior Court directly after the bind-over order on January 13th as is frequently done by this counsel and other defense attorneys. In any event this fact is well founded.

ASSIGNMENTS VII AND XII

Although defendant in his Brief asserts that these findings "are in direct contradiction to evidence produced by the State and the defendant," he cites not one line of testimony to prove such contradiction. We, on our part, refer specifically to the ample evidence consistent with these findings:

Paragraphs 80 and 111 were properly found on the basis of Sergeant Eagan's testimony that he had received a ballistics report from the State Police on the gun found in the possession of defendant (Defendant's App. pp. 11-12) and from the testimony of defendant himself that the officers told him that his gun had been used in the murder (Defendant's App. p. 16). See also Finding Par. 24.

Paragraph 83 is almost a precise rendition of defendant's own testimony (Defendant's App. p. 15).

Paragraph 85 is predicated on Sergeant Eagan's testimony on this subject (Defendant's App. pp. 9-10).

Paragraph 91 is to be found in Sergeant Eagan's testimony (Defendant's App. p. 8).

Paragraphs 95 and 96, finding that defendant was not subjected to continuous or extended questioning, result from the following evidence:

> Defendant: I took whole hour to consider whether to confess (Defendant's App. p. 17).
>
> Defendant: Stopped for coffee (Defendant's App. p. 19).
>
> Sgt. Eagan: Smoked cigarettes (State's App. pp. 1-2).
>
> Brief recess taken (Exhibit VV, p. 29).

Paragraph 97 has ample support in Sergeant Eagan's testimony that no force, pressure, or promise of reward was directed to defendant (Defendant's App. p. 5), and in defendant's failure to claim any such adverse influences (Defendant's App. p. 20).

ASSIGNMENT VIII

As to Paragraphs 99-103, an examination of the evidence manifests the ample support for these Findings (Defendant's App. pp. 3-21, Exhibit VV; See also comments of Court, Record p. 33).

ASSIGNMENT IX

The propriety of Finding Paragraph 104, is altogether obvious. Nowhere in his Claims of Proof (Par. 29-51) does defendant

assert that he offered any evidence to prove or that he claimed to have proved either (1) that he did not shoot Mrs. Kennedy, or (2) that his confessions of the murder were untrue. This glaring omission impels a finding as made.

ASSIGNMENTS X AND XV

As to the propriety of these Findings (Pars. 105, 106, 107 and 130) see discussion under Assignments of Error IV and V, parts B and D infra.

ASSIGNMENTS XIII AND XIV

The defendant in his Brief makes a general statement that Paragraphs 122-127, 129 and 132 were not based on evidence. Reference to the testimony of the defendant and of the Coroner (Defendant's App. pp. 13-30) and to the statements of the defendant himself (Exhibit VV and WW) disclose ample support for these Findings.

As to Paragraph 124 the defendant makes specific objection that: "there was no evidence adduced at the trial that the defendant was familiar with being arrested and that he was familiar with ordinary police procedure." Apparently the defendant has lost sight of the undisputed evidence that the defendant was the 46 year old brother of a former police officer (Defendant's App. p. 28); that on November 22, 1953, he had gone to Police Headquarters and there made a false report regarding this same gun (Finding Par. 17); that the defendant had been arrested for three felonies on January 9, 1954 (Finding Par. 19) and had been questioned by police that evening and again on the following day regarding those crimes (Finding Par. 22).

As to Paragraphs 129 and 132, see discussion in Assignments IV and V, Part B, infra.

ASSIGNMENT OF ERROR I

DENIAL OF MOTIONS FOR CHANGE OF VENUE

In his motion for a change of venue the defendant failed to sustain his burden of showing that a fair and impartial trial could not be had in this County.

State vs. *Chapman*, 103 Conn. 453, 470.

It was not sufficient for defendant merely to show that the murder had received considerable publicity; he must also establish that the publicity was necessarily prejudicial to him.

State vs. *Rocco*, 109 Conn. 571, 572.

State vs. *Cianflone*, 98 Conn. 454, 461.

State vs. *Leopold*, 110 Conn. 55, 58.

Here the defendant made no showing of any resultant prejudice. On the contrary, in Findings to which the defendant takes no objection, it affirmatively appears (1) that no member of the panel had any knowledge or recollection of the newspaper articles (Finding Par. 139); and (2) that the jurors accepted in the case had no recollection of having heard or read of any confession by the defendant (Finding Par. 140). Obviously, under these circumstances no possible prejudice could accrue to the defendant from this publicity.

There is one other consideration decisive of this issue. It is conceivable that a defendant might be prejudiced by such publicity where the claimed confession was not introduced at the trial. Here, however, the two confessions were actually presented in evidence and became part of the case. Accordingly, no possible injustice could arise from the newspaper notices.

Stroble vs. *California*, 343 U. S. 181, 195, 96 L. Ed. 872, 72 Sup. Ct. 599.

There was, therefore, no abuse of the Court's discretion in denying these motions.

State vs. *Leopold*, supra.

ASSIGNMENT OF ERROR II

REFUSAL TO CHARGE AS REQUESTED

These requests to charge (Pars. 52-53) were properly refused because they are predicated on a premise contrary to the conclusion of the Court on these points. Defendant maintained that the transportation of the accused to the Office of the State's Attorney on January 30th, and his appearance at the Coroner's hearing on January 31st were irregular and improper; that the accused was improperly and irregularly denied access to counsel on both these occasions; that the accused did not understand that he was under no duty to testify before the Coroner and that his confession of January 30th was induced by fear of reprisals against his wife.

The charge as given sets forth amply and properly the circumstances to be considered by the jury in determining the weight to be accorded to the confessions. Accordingly, there was no error in refusing these requests.

See discussion under Assignments IV and V, Part B infra.

ASSIGNMENT OF ERROR III

THE CHARGE

The defendant here complains that the Court "failed to explain fully that the jury was to determine what weight was to be given to the confessions" and by its charge foreclosed the jury from a consideration of the facts attendant upon these confessions.

On the contrary, the Court instructed the jury at considerable length on this point (Pars. 55-56), urging them to consider all of the "circumstances under which they were procured," including the artifice of the police, the claim of illegal detention, the absence of counsel, and "everything else that you recall;" to the end that the jury might be enabled to determine the truth of the statements and the weight to be accorded them.

State vs. *McCarthy*, 133 Conn. 171, 177.

State vs. *Willis*, 71 Conn. 293, 314.

This constituted a proper allocation of functions: the Court first finding that the confessions were so voluntary as to be competent for the consideration of the jury, and the jury then considering the circumstances under which the confessions were made in its effort to determine the truth of their contents.

State vs. *McCarthy*, supra.

The definition of the crime of Robbery as set forth in the first sentence of Paragraph 58 contains within its terms an adequate definition of theft so that further elaboration was altogether unnecessary.

2 Swift's Digest, p. 326.

State vs. *Battista*, 110 Conn. 549, 558.

The Court's reference to "attempted robbery" in its charge did not broaden or enlarge the indictment. Whether committed in perpetrating or attempting to perpetrate a robbery, the crime charged was Murder in the First Degree. Neither at common law nor under the statutes making all murder committed in the perpetration of or attempt to perpetrate certain felonies, murder in the first degree, is it necessary to charge in the indictment that the murder was committed in perpetrating or attempting to perpetrate such felony, in order to authorize the introduction of proof showing such fact.

2 Warren on Homicide, Sec. 178.

State vs. *Meyers*, 99 Mo. 107; 12 S. W. 516.

An indictment drawn in common form is sufficient to warrant a conviction in the perpetration of a felony.

Warren on Homicide, supra.

So, the indictment here would have been valid without the words "in perpetrating a robbery" (P. B. Sec. 344). In such case where the indictment does not allege, but the evidence shows an attempt to commit robbery, the Court can charge on homicide in an attempted robbery.

4 *Warren on Homicide*, p. 94.

26 *Am. Jur.* p. 331.

A fortiori, where the indictment actually alleges robbery, the Court may include in its charge a reference to attempted robbery. Such an allegation gives defendant ample notice of the offense charged against him, so that he can properly prepare his defense.

P. B. Sec. 344.

Clark Crim. Proc. p. 150.

If the proof of the mode of producing death agrees with the allegations in substance and generic character, it is sufficient; precise conformity is not required.

26 *Am. Jur.* p. 346.

Accordingly, there was no error in this instruction on attempted robbery.

State vs. *Mele*, 140 Conn. 398, 401.

ASSIGNMENTS OF ERROR IV AND V

A

EVIDENCE

If this evidence of a usual practice was improperly admitted, it was altogether harmless, because it was not disputed that this was the procedure actually used in this case; and if there was any illegality in the procedure used, it did not cause the confession; and furthermore the jury was specifically instructed to take these very matters into consideration that "he was left incommunicado" and "the manner in which he was taken from the jail to the State's Attorney's Office" (Finding Par. 56).

Conn. App. Proc. Sec. 15.

B

CONFESSION TO CORONER

In his attack on the admission of Exhibit WW in evidence, defendant seems to be claiming that (1) his appearance before the Coroner was illegal, and (2) his right to counsel was not properly explained to him.

1. The claim that defendant was under illegal detention in his appearance before the Coroner is extremely tenuous. In his investigation of this murder, the Coroner had power to summon witnesses to appear before him. If, however, he could secure defendant's attendance by request to the police, it is difficult to see how that method is less lawful than the formal process of a subpoena.

State vs. *Buteau*, 136 Conn. 113, 121.

In any event, if there was any illegality in this appearance without a subpoena, the fact was utterly unknown to defendant, until the claim was conceived by his counsel. And since he was unaware of it, certainly his confession cannot be said to be the result of the alleged illegality.

State vs. *Gustamachio*, 137 Conn. 179, 183.

2. Not only did the Coroner in clear and concise language inform defendant of his right to counsel, but he also stressed repeatedly defendant's right to refuse to testify altogether (Exhibit WW, pp. 1-2).

That "the technicalities and artifices of his adversary" did not confound him is amply evident from his unequivocal statement "I understand" (p. 2) and from his ready responses throughout the interrogation. His high sense of perception and comprehension is further demonstrated by his testimony in court (Defendant's App. pp. 13-21). His age, his intelligence and his prior police contacts equipped him admirably to make a statement that was altogether free and voluntary. Under these circumstances the mere absence of counsel does not render the confession inadmissible.

Stroble vs. *California*, 343 U. S. 181, 196; 96 L. Ed. 872, 72 Sup. Ct. 599.

C.

DENIAL OF MOTION FOR MISTRIAL

In presenting evidence that, following defendant's illness in 1948 there was a noticeable change in him (Finding Par. 69),

defendant was thereby endeavoring to create the impression (1) that his mental condition rendered him unaccountable or less accountable for this crime and (2) that prior to his illness he had never before committed a crime. Defendant cannot hope to present his evidence in a vacuum. If he raises an issue, he must expect it to be met, and in asking this question, the State's Attorney was performing the proper function of cross-examination.

State vs. *McLaughlin*, 126 Conn. 257, 263.

The rule precluding evidence of other similar crimes has many notable exceptions.

State vs. *Gilligan*, 92 Conn. 526.

State vs. *Ward*, 49 Conn. 429.

The rule is always subject to the further consideration that the inadmissability of an evidential fact for one purpose does not render it inadmissible for some other purpose otherwise proper.

State vs. *Simborski*, 120 Conn. 624, 631.

We submit that here the evidence was properly claimed to rebut the implications which defendant was striving to create—that he had never committed a robbery before his 1948 illness and that his ensuing mental condition should give him some measure of absolution.

State vs. *McLaughlin*, supra.

However, apparently in an excess of caution, the Court excluded the question and instructed the jury to disregard it and any implication connected with it (Finding Par. 70).

Defendant mistakenly states in his Brief (p. 20) that this question led to the "inclusion in the Finding, without evidence of the police history of the accused." These findings were based on other independent undisputed evidence.

See discussion of Assignments XIII and XIV, supra.

There was accordingly no occasion for a mistrial.

D

CONFESSION TO THE POLICE

No exception can be taken to the principle of law set forth in the caption to this part of defendant's Brief, except that it has no relation to the facts of this case where defendant was accorded all the consideration reasonably to be expected by one arrested for a first degree murder.

State vs. *Butcau*, 136 Conn. 118, 120.

The defendant's objections to the admission of this confession (Exhibit XV) seem to be based on these claims, (1) that his delivery to the State's Attorney's Office was illegal; (2) that he was denied access to counsel; (3) that the questioning was continued over a long time; and (4) that he confessed after police threatened to arrest his wife.

1. The short answer to this claim of illegality is that defendant was unaware of it and the confession was not causally connected with it.

State vs. *Guastamachio*, 137 Conn. 179, 183.

State vs. *Butcau*, supra, 123.

State vs. *Zukauskas*, 132 Conn. 450, 459.

Beyond that, it should be noted that on the date of this confession, the defendant was in the status of a bound-over prisoner on charges of several other felonies (Finding Pars. 19-23). The officers investigating this murder concededly could have questioned him at the jail; or they could have taken him to the scene of the crime (cf. *State* vs. *Butcau*, supra, 119). Their use, instead, of the State's Attorney's Office cannot be said to be unlawful so long as their treatment of the defendant was at all times fair. "In no instance will the court permit any legitimate effort of the officers of the law to be hampered in securing from an accused all that he knows concerning the crime charged against him, provided, always, that the means used be not unfair and not subversive of our established law."

State vs. *Battista*, 110 Conn. 549, 563.

2. As to absence of counsel it should be observed that this confession was not a secret inquisition by the police but a formal interrogation in the presence of an official Superior Court Reporter. If defendant were in fact clamoring for counsel at the time of this confession, would there not be some evidence of it on at least one of the thirty pages of his statement? An especially admirable opportunity to insist upon counsel was afforded defendant during the pause for coffee just at the commencement of the statement (See Exhibit VV, p. 1). His failure to do so at that time makes irresistable the conclusion that he considered counsel dispensable.

In any event, there is no rule of law that requires police to permit an accused person the benefit of counsel to advise him as to whether or not he shall confess.

State vs. *Murphy* (1915), 87 NJL 515, 94 Atl. 640.

The refusal to permit counsel to consult prisoner during the making of a confession does not amount to such unfairness as as to deny due process.

Stroble vs. *California*, 343 U. S. 181, 196.

See also *State* vs. *Cross*, 72 Conn. 722, 728.

3. That the defendant was not subjected to continuous or protracted questioning is amply evidenced by his own testimony that during the first hour he was not questioned at all (Defendant's App. p. 15) and that some time later he took an hour to consider whether to confess (Defendant's App. p. 17). During the questioning defendant was permitted to smoke (State's App. pp. 1-2), there was a recess for coffee (Defendant's App. p. 19), and thereafter another recess (Exhibit VV, p. 29).

4. The claim that a threat to arrest his wife produced the confession cannot be substantiated. The proposed call for Mrs. Rogers did not constitute a threat. Chief Eagan merely stated that he was intending to send for her in order to ascertain whether she had any information relating to this murder (Defendant's App. pp. 7-8). From the reluctance of defendant to have her appear it may be inferred that she had such information, or that her pres-

ence would hamper him in his fabrication of an illicit relationship with deceased (Exhibit VV). That his objection was not in fact based on any actual illness of Mrs. Rogers is attested by the fact that she appeared and testified at the trial without attendance or assistance.

If Chief Eagan's statements constituted a threat, it was not such as was likely to produce a false confession.

State vs. *Guastamachio*, 137 Conn. 179, 182.

For is it at all conceivable that defendant, merely to avoid inconvenience to his wife, would confess guilt of a murder he did not in fact commit?

There was nothing in the circumstances attendant upon this confession that would render it too unreliable to go to the jury. Hence there was no error in its admission in evidence.

State vs. *Willis*, 71 Conn. 293, 310.

THE STATE OF CONNECTICUT,

By ABRAHAM S. ULLMAN,
State's Attorney.

ARTHUR T. GORMAN,
Assistant State's Attorney.

APPENDIX

Raymond J. Eagan.

Direct Examination (continued) by Mr. Ullman.

Q. I think you had stated, Chief Eagan, that you arrived here at the State's Attorney's Office some time shortly after eight o'clock and questioned the accused? A. That's right.

Q. And the accused at that time, I think you said, was seated in a chair in one of the rooms in the State's Attorney's office? A. That's right.

Q. Will you tell us in what condition he was seated there? A. Rogers was seated in a chair there with handcuffs, as I said before—one cuff was free and the other was on a wrist. That is my best recollection of it.

Q. I see. In other words, the cuffs were attached to one wrist? A. That's right.

Q. And the other wrist was free? A. That's right, sir.

Q. Did he move his arms around? A. He played with the loose cuff, just around the arms of the chair.

Q. Aside from that did he move his hands around for other purposes? A. He smoked cigarettes, mine and his, and one of those present ran out and he had coffee and he had more cigarettes brought to him.

Q. Before having coffee did you have some conversation with him regarding something to eat: A. I did.

Q. What was that? A. I don't remember who was going out, but somebody volunteered to go out and get something to eat and Rogers was asked what he wanted, if he wanted anything else besides coffee, and he said no, all he wanted was coffee. Others had sandwiches and he had coffee.

Q. Sandwiches and coffee were brought in? A. That's right.

Q. But the accused didn't eat anything, he just drank coffee? A. That's right.

Q. And for how long a period did you question him before any transcription was made? A. About two hours and ten minutes.

Q. Were you doing the questioning? A. I was.

Q. And was it repeated—or continuous, rather, or were there pauses and interruptions? A. There were breaks.

Q. There were. And during all that time the accused was seated? A. That's right, sir.

Q. In asking him questions did you make any threats against him? A. I did not.

Q. No threats of inflicting harm or damage or anything else to him? A. No, sir.

Q. Did you make any promise of immunity or of reducing the penalty or anything else? A. No, sir. I told Rogers that nothing that he talked to me about, if he did talk, could be of any benefit to him, it would be up to the Court or jury, whatever he made any statement to, that I as a police officer had no power or right to offer him anything.

Q. Did you use any coercion upon him at all? A. No, sir.

Q. Or any force? A. No, sir.

Q. How did he answer the questions as you put them to him? A. His responses were direct, right as soon as the question was asked.

Q. Did you have to press him for answers in any instance? A. No, sir.

Q. He made the answers directly? A. That's right, sir.

Q. And at some time was there some discussion about his wife? A. There was.

Q. Will you tell us what that was. A. In talking to Rogers I told him I felt I would have to bring his wife down and talk to her. He said, "Why do you have to do that?" I said, "Because you have been under arrest and now that this thing has happened, you still had the gun, it may be that your wife in a visit to the jail, you informed her of other trouble you might be in." He said, "Well, she wouldn't know anything about anything I do." I said, "Well, I don't know that. It may be possible a man in trouble would tell his wife what trouble he was in." That's all I said to him.

Q. And at sometime or other did he make some statement regarding this affair of November 21? A. He did.

Q. What did he say? A. Well, the first thing he said was—

Mr. CORSE. Object to that, if the Court please, for the record.
The COURT. Overruled.
Mr. CORSE. May I have an exception?
The COURT. Exception may be noted.

TRANSCRIPT OF PROCEEDINGS BEFORE THE DISTRICT COURT, SMITH, J.

January 14, 1957.

Mr. ULLMAN. If the Court please, we made this motion to have included in the record on appeal the original confessions which we presented to this Court on the Motion for Rehearing as well as the record of the proceedings in the State courts.

The Clerk of the Court is uncertain as to whether those should be included as part of the record on appeal and, as your Honor will recall, they were original papers filed by us and we feel that they should be. If your Honor has any question regarding it I would like to be heard. We propose, of course, to use those papers, those original papers, in the course of our arguments before the Court of Appeals.

The COURT. Are they identified at the present?

Mr. ULLMAN. The confession made by the Accused?

The COURT. I mean are they identified by being marked for identification, or otherwise?

Mr. ULLMAN. I don't believe they were marked for identification, but they are the confession of Chief Eagan and the confession of the Coroner.

The COURT. Well, let's get them marked now so that there will be no question as to their identitfy.

Mr. ULLMAN. I think they are blue-backed, light blue color. I think there are just these.

The COURT. One more; four of them.

Mr. ULLMAN. Shall they be marked?

The COURT. Yes, as soon as the Clerk comes back with the stamps.

What was the last letter of the marking on the original trial here, do you recall?

Mr. ULLMAN. I didn't hear.

The COURT. Do you recall the last letter used in the marking on the original hearing here?

The CLERK. It would be in the transcript.

The COURT. Was there anything marked formally on the motion for rehearing?

Mr. ULLMAN. There's nothing marked, as I recall it on the day we argued the Motion for Rehearing or for Correction of Finding.

Mr. ROBINSON. On the transcript I have page 102 I think, of the Rehearing, when the matter was taken up.

The COURT. Well let them be marked as those received at the Motion for Rehearing; that would be Respondent's Exhibits AA, AB, AC and AD for Identification at this time.

The COURT. AA for Identification, the record for the Supreme Court of Errors.

(Respondent's Exhibit AA for Identification. Record for the Supreme Court of Errors.)

The COURT. AB for Identification, Examination of Rogers by Chief Eagan.

(Respondent's Exhibit AB for Identification. Examination of Rogers by Chief Eagan.)

The COURT. AC for Identification, examination before the Coroner.

(Respondent's Exhibit AC for Identification. Examination before the Coroner.)

The COURT. AD—

Mr. ULLMAN. The last was a brief to be laid before the Supreme Court of Connecticut.

The COURT. AD for that.

(Respondent's Exhibit AD for Identification. Brief to be laid before Supreme Court of Connecticut.)

The COURT. The record will show, then, that these were presented to the Court as indicated on page 122 and at the Motion for Rehearing, and the Memorandum on the Motion for Rehearing indicates that that motion was denied and further evidence was not received for consideration by the Court in view of the ruling on the motion for Rehearing; so that these may be included

by the Clerk in the record on Appeal if the Respondent desires to raise any question concerning the ruling of the Court denying the Motion for Rehearing and denying consideration, at that time.

Mr. ULLMAN. May the record show, if your Honor please, whether or not the Court, this Court, considered them in its decision on the Motion for Correction of Finding and for Rehearing?

The COURT. I think it is so indicated.

Mr. ULLMAN. What's that?

The COURT. I think it is so indicated in the memorandum that the Court did not consider any evidence not presented on the first hearing.

Mr. ULLMAN. I didn't know that that was clear.

The COURT. I think it is now.

Mr. ULLMAN. Very well, sir.

Mr. ROBINSON. Just formally, I wish to object to the inclusion in the record except on the basis that your Honor has indicated which, of course, is the proper inclusion, if only made the basis of a claimed error in not granting the Rehearing because, in effect, this motion, although it does not state it, the motion before your Honor now is a request to have these documents, which were treated first on page 122 of the transcript of the proceedings on Rehearing, simply treated as a means of convenience to the State so that if your Honor had acted otherwise on the motion they would be here for your consideration as a part of the evidence that was being offered at the Rehearing, and I doubt very much that this motion should be used either directly or indirectly and for that reason we feel only for the limited purpose of determining whether or not a rehearing should be granted, that they should not be made a part of the record and should be definitely so limited that they should not be used in testing the correctness of your Honor's original decision in this matter, otherwise, we would have an Appellate Court asked to test the correctness of a decision on matters that were not before the Court for its determination. It wouldn't be fair to anybody concerned.

The COURT. I think that is a matter for the Appellate Court as to what use had been made of them on the Rehearing and also

whether they are in Habeas Corpus available to the Appellate Court for its consideration in the appeal.

Mr. ULLMAN. That applies to all of the four exhibits?

The COURT. Yes.

Mr. ROBINSON. Of course I would like to say one thing, in my memory—and that is not only always something I can rely on—that the only matters presented of the four that have been marked for identification now were the two claimed confessions. I do not believe—I will go through this and readily concede it to be otherwise if I find it because the other two exhibits were even offered as matters for rehearing. It's 122 pages and I have just gotten it, through my own fault. It has been ready for a long time.

Mr. ULLMAN. The record, of course, was offered to the Court?

The COURT. Yes.

390 In United States Court of Appeals for the Second Circuit

No. 59—October Term, 1957

Argued January 9, 1958.

Docket No. 24517

UNITED STATES EX REL. HAROLD D. ROGERS, Relator-Appellee

v.

MARK S. RICHMOND, Warden, Respondent-Appellant

Before: HINCKS, LUMBARD and WATERMAN, Circuit Judges.

Relator brought habeas corpus proceeding in the United States District Court for the District of Connecticut, Smith, *J.*, to secure his release from custody under judgment of conviction of murder in the state courts, on the ground that two confessions admitted in evidence in the murder trial were improperly admitted. From a judgment sustaining the writ, the respondent appeals. Vacated and remanded.

391 ABRAHAM S. ULLMAN, State's Attorney for New Haven County, New Haven, Conn., and ROBERT C. ZAMPANO, New Haven, Conn. (Arthur T. Gorman, Assistant State's Attorney for New Haven County, New Haven, Conn., on the brief), for appellant.

LAWRENCE M. DOOLEY, Public Defender for New Haven County, New Haven, Conn., for relator-appellee.

549218—60——1

HINCKS, Circuit Judge:

The relator, Harold D. Rogers, was tried and convicted in the Connecticut Superior Court of murder, committed during the perpetration of a robbery. He was sentenced to death. The conviction was appealed on the ground that the trial judge, over objection, had improperly admitted two confessions introduced at the trial. A related claim of error concerned the denial of the right to counsel. The Supreme Court of Errors affirmed the conviction, one judge dissenting. 143 Conn. 167, 120 A. 2d 409, cert. den. 351 U.S. 952.

The relator then sought a writ of habeas corpus from the United States District Court for the District of Connecticut. The District Judge issued the writ and, after holding hearings and making a new record as to the facts surrounding the origin of the two confessions, ordered the sentence vacated. 154 F. Supp. 663. The State obtained a certificate of probable cause from the District Judge, as required by 28 U.S.C.A. § 2253, and has taken the present appeal.

The State's argument is essentially twofold. While conceding the power of the District Court to reach conclusions on the issue of coercion different from those of the State court, the State asserts that
392 the District Court lacked the power to conduct, or, at least, abused its discretion in conducting, a hearing de novo for the purpose of ascertaining basic evidentiary facts—when all of the fact questions (so the State contends) had been raised and decided in the State trial court and considered on appeal.

The State's second contention is that as a matter of law the facts as found by the State trial judge would not support a conclusion of law holding either of the confessions to be inadmissible. For the reasons

which we shall shortly state, we do not reach or pass upon this second contention.

But for the case of Cranor v. Gonzales, 9 Cir., 226 F. 2d 83, cert. den. 350 U.S. 935, which we shall presently show to be distinguishable, the instant case is the first habeas corpus proceeding since the leading case of Brown v. Allen, 344 U.S. 443, in which the District Judge held a hearing de novo and the propriety of his doing so was challenged on appeal. For that reason we deem it important to set forth at some length our views as to the proper functions of a United States District Judge when he has ordered a writ of habeas corpus to issue.

In one of the three companion appeals in Brown v. Allen, supra, the Court considered whether the federal court might properly place complete reliance on the state record and much that was said there is applicable to the instant case. Both Justice Reed's opinion and Justice Frankfurter's concurring opinion speak for a majority in discussing the proper procedure to be followed in the District Court. Justice Reed indicates that where the record of the state trial affords "an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required." 344 U.S. at page 463. This is immediately followed by the statement that "a trial may be had in the discretion
393 of the federal court or judge hearing the new application."[1] Justice Frankfurter's opinion discussed the problem at considerable length and states that the District Judge "must take due account of the proceedings that are challenged by the application for a writ. All that has gone before is not to be

[1] The emphasis we have supplied to call attention to language on which the relator greatly relies.

ignored as irrelevant." 344 U.S. at page 500. And again, at page 501, he states that in habeas corpus proceedings federal judges should "probe the federal question while drawing on available records of prior proceedings to guide them in doing so."

The statements just quoted assume that the state transcript is before the District Judge. However, in the instant proceeding such was not the case. Neither the relator nor the State presented a transcript of the relevant evidence in the State trial and the District Judge at no time called for such a record or considered it.

Justice Frankfurter's opinion in Brown v. Allen, supra, anticipated just this situation. At page 503, he states:

> If the record of the State proceedings is not filed, the judge is required to decide, with due regard to efficiency in judicial administration, whether it is more desirable to call for the record or to hold a hearing. Ordinarily, where the issues are complex, it will be simpler to call for the record, certainly in the first instance. If the issues are simple, or if the record is called for and is found inadequate to show how the State court decided the relevant historical facts, the District Court shall use appropriate procedures, including a hearing if necessary, to decide the issues.

See also Justice Reed's opinion, 344 U.S. at page 464, fn. 19. Difficulty in obtaining a State court
394 transcript was not present here for it is quite apparent that the parties, during the hearing before the District Judge, had copies of the State court transcript; indeed at one point the relator's counsel tore out certain pages of his copy of the

transcript and presented them as an exhibit to the District Judge. Thus, although, at 344 U.S., page 504, Justice Frankfurter indicates that it would be "unduly rigid" to require the District Judge to call for the State record in every case, we hold that in the case now before us the nature of the issues presented and proper regard for the delicate balance of federal-state relationships required the District Judge to obtain and examine the State proceedings at the outset of these proceedings.

The relator's reliance upon Cranor v. Gonzales, supra, is misplaced. In that case the relator had objected to the introduction of a confession at his trial in the State of Washington. Washington applied the so-called "New York" rule of confessions, see Stein v. New York, 346 U.S. 156, and since facts bearing on the voluntariness of the confession were in dispute, the trial judge let the confession and surrounding facts go to the jury, charging that if the jury found the confession to have been coerced the jury was to disregard it entirely.

In the ensuing federal habeas corpus proceedings the District Judge took evidence on the basis of which he found the confession to have been coerced. On appeal, the court of appeals, applying Fed. Rules Civ. Proc. rule 52(a), affirmed, declaring that the new hearing below was proper.[2] The federal court of appeals did not expressly rely on a "vital flaw"
395 or "unusual circumstances"—phrases used in the Brown v. Allen opinions—to uphold the

[2] In Stein v. New York, supra, the Supreme Court held that since quite apart from the confession there was ample evidence to convict, a conviction would not be reversed where the New York rule had been applied. In Cranor, the Court distinguishes Stein on the basis that Stein had reached the Supreme Court through the state courts on appeal from a conviction and not in a habeas corpus proceeding.

hearing. But the facts did show what might properly be considered such a flaw. That is, the findings as to the voluntariness of the confession and as to guilt were merged in a single general verdict so that if in the State proceedings the jury had given effect to a confession it found to have been coerced, the relator could not possibly prove that fact in the subsequent habeas corpus proceedings. See Note, 5 Duke B.J. 147. Thus, because there was no express finding as to the voluntariness of the confession in the state court, the federal court had no State finding to which it could have referred. The District Judge, therefore, was faced with two choices. He might have attempted to acquire a trial transcript of the state trial and make his findings from the raw evidence therein contained; or, he might have held a hearing de novo. In the circumstances of the Cranor case justice might more surely have been achieved by the latter procedure which permitted observation of the witnesses. For credibility was crucial—and had never been expressly determined before.

The essential distinction between Cranor and the instant case is obvious. Connecticut follows the so-called "orthodox" rule in testing the admissibility of confessions. State v. Guastamachio, 137 Conn. 179, 75 A. 2d 429; State v. McCarthy, 133 Conn. 171, 49 A. 2d 594, 3 Wigmore, Evidence § 861. Here, the trial judge in conformity with that rule held a hearing before trial, made express findings, and concluded that the confessions were each voluntary. Whether we shall adopt the Cranor rule is a decision which can be deferred until we are presented with a case in which

a state court has invoked the so-called "New York" rule.[1] It is sufficient for present purposes
396 merely to observe that Cranor does not hold that a federal court on habeas corpus may try de novo an issue of fact which was expressly determined in the state trial.

In the instant case, we must hold, the failure of the judge below to call for and consider the trial record or so much thereof as related to the admissibility of the confessions, requires us to vacate the order appealed from and remand.

However, the absence in the court below of an adequate state record, which makes it impossible for us to affirm the order below, also makes it impossible for us to determine at this stage what disposition should be made of the writ on the merits. To be sure, we have examined the record of appeal from the State trial court upon which the Connecticut Supreme Court of Errors affirmed the conviction. This record was marked as an exhibit for identification when it was offered on the motion for rehearing and the court below refused to receive or consider it. It contained the pleadings, the findings of the trial judge including those on the admissibility of the confessions, the charge to the jury and the exceptions thereto, and various parts of the transcript which

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[1] The value of the New York rule has been questioned by some writers, e.g., Meltzer, Involuntary Confessions, 21 U. Chi. L. Rev. 317. It has also been suggested that if the rule of Cranor shall be followed state courts, in order to protect convictions from reversal in subsequent federal habeas corpus proceedings, may abandon adherence to the so-called New York rule. 54 Mich. L. Rev. 856.

were essential to the determination by the appellate court of the propriety of certain rulings made below. We can say that in our opinion nothing in this state record of appeal discloses such a "vital flaw" in the State court proceedings or any such "unusual circumstances," as those terms are used in Brown v. Allen,[4] as would warrant the federal court in
397 holding a hearing de novo on the issue of the admissibility of the confessions. However, the state record of appeal did not contain a complete transcript of the evidence taken in the preliminary hearing before the trial judge on the admissibility of the confessions. Without such a transcript the appeal record did not of itself disclose whether the trial judge had made historical findings on all the relevant evidence. Only on an adequate state record can the District Court determine if a vital flaw exists which warrants correction by extrinsic evidence.

We conclude, therefore, that on remand the judge below should take such steps as will assure him that he has in evidence not only the findings of the trial court as to the admissibility of the confessions but also the transcript of the preliminary hearing on which the trial findings were based. Unless the judge below shall find in the record thus before him material which he deems to constitute "vital flaws" and "unusual circumstances" within the meaning of Brown

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[4] At 344 U.S., page 506, Justice Frankfurter said: "When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding * * *"

v. Allen, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the State trial court. Brown v. Allen, at pages 507-8.

To be sure, in Brown v. Allen it was said that in the absence of a vital flaw or of unusual circumstances the federal judge "may" rely on the state record. From this, the relator urges that the federal judge "may" also retry disputed issues de novo. In effect, the argument is that in a given situation either procedure is equally available irrespective of other factors. We do not agree. Brown v. Allen and many other federal cases recognize that serious federal-state
398 tensions may spring from federal review of the constitutional incidents of state judicial proceedings. In Brown v. Allen, the problem was whether it was proper for the federal court to rely on state court findings. That power was recognized subject to the limitations stated. Here, the problem is whether it was proper for the federal court not to accept state court findings. We think that the Brown v. Allen opinion as a whole and the expressed concern of the Court for federal-state relations require a holding that subject to the same limitations the federal court should accept the State court findings.

Vacated and remanded for further proceedings in accordance with this opinion.

399 In United States Court of Appeals for the Second Circuit

Present: Hon. CARROLL C. HINCKS, Hon. J. EDWARD LUMBARD, Hon. STERRY R. WATERMAN, Circuit Judges.

U.S. ex rel HAROLD D. ROGERS, PETITIONER-APPELLEE

v.

MARK S. RICHMOND, WARDEN CONNECTICUT STATE PRISON, RESPONDENT-APPELLANT

JUDGMENT—FEBRUARY 20, 1958

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is vacated and action remanded for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk.*

400 [File endorsement omitted.]

401 [File endorsement omitted.]

403 In the United States Court of Appeals for the Second Circuit

[Title omitted.]

PETITION OF RELATOR FOR REHEARING—FILED, MARCH 7, 1958

On appeal by the State from the order of the United States District Court for the District of Connecticut in a habeas corpus proceeding vacating the

death sentence imposed on relator Harold D. Rogers, this Court held that the "nature of the issue presented and proper regard for the delicate balance of federal-state relationships required the District Judge to obtain and examine the state proceedings at the outset of these proceedings." Although relator does not acquiesce in this holding for purposes of possible further appellate review by the Supreme Court, this petition for rehearing, filed pursuant to Rule 25 of the Rules of this court, does not challenge that holding for relator's position has been clearly rejected. Rather it is the purpose of this petition to urge the court to reconsider that part of its opinion which deals with the remand instructions to the United States District Court other than the specific holding that the trial judge must call for and consider all the relevant state court proceedings. In this petition relator requests the court to (a) grant rehearing on the question of the District Court's discretion to
404 supplement the state court findings with the testimony taken at the hearing in the District Court and, (b) to modify language in its opinion which might be construed as precluding the District Judge from finding that a "vital flaw" or "unusual circumstance" occurred in the state court proceeding which would justify the District Judge in contradicting an express finding of the state court.

I. ON A HEARING

At the initial argument of this case, relator relied heavily on the language of Brown vs. Allen, 344 U.S. 443 (1952) which indicates that the District Court may hold a hearing in a habeas corpus proceeding even though there was no "vital flaw" or "unusual

circumstance" in the state court proceeding.[1] Reading Brown vs. Allen as a whole this court disregarded relator's reliance on this specific discretionary language because of what it felt was the Supreme Court's concern for federal-state relations. From the last paragraph of this court's opinion it is clear that this court reached that conclusion solely from the Supreme Court's consideration of No. 32, the only one of the three cases disposed of by the Brown vs. Allen opinion where the District Court made its decision solely on the basis of the state record. How-
405 ever, in Speller vs. Allen, No. 22, and Daniels vs. Allen, No. 20, the District Court did hold hearings on the factual issues of the proceeding even though they had before them the full record of the state proceedings. In both these cases the constitutional issues presented on habeas corpus had been determined in a hearing before the state court trial judge who had made specific findings on the issue. (Daniels vs. Allen, 344 U.S. 443, Brief of Respondent on Writ of Certiorari, p. 5 and Speller vs. Allen, 344 U.S. 443, Brief of Respondent on Writ of Certiorari, pp. 7 and 8). The findings were not merged in a general verdict, as in Cranor vs. Gonzales, 9 Cir.

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[1] Relator relies on Justice Reed's statement that: "Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required * * *. However a trial may be had in the discretion of the federal court or Judge hearing the application." Brown vs. Allen, supra, 463–464.

And on Justice Frankfurter's statement that: "Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding * * *."

Ibid., 506.

226 F. 2d 83, cert. den. 350 U.S. 937. There is no suggestion that there was a "vital flaw" or "unusual circumstance" in the state court proceedings. Nowhere in the Court's opinion in Brown vs. Allen, despite the fact it is setting out guides for the federal court to follow in habeas corpus proceedings, is it suggested that the procedure followed by the District Court in these two cases tended to upset the balance of federal-state relationships.

There was no need for this court to transpose from the Supreme Court's language in the situation where the District Court held no hearing to determine what the Supreme Court's view would be when the District Court does hold a hearing. For Mr. Justice Reed, speaking for the court in Brown vs. Allen, specifically approved the propriety of the District Court holding a hearing in No. 22; although the District Court had the state record and there existed no "vital flaw" or "unusual circumstances" in the state proceedings:

> The petition * * * raised again the same federal question which had been passed upon by both North Carolina courts and which had been offered to this court on petition for certiorari, racial discrimination. The District Court heard all additional evidence the petitioner offered. This was in its discretion. Moore vs. Dempsey, 261 U.S. 86; Darr vs. Burford, 339 U.S. at 214, cases which establish the power of federal district courts
> 406 to protect the constitutional rights of state prisoners after the exhaustion of state remedies. *It better enabled that court to determine whether any violation of the Fourteenth Amendment occurred.* Brown vs. Allen, supra, at 478. [Emphasis added.]

Relying on these comments of the Supreme Court directed specifically to a habeas corpus proceeding where the trial judge had in fact held a hearing, relator requests a reconsideration of this court's instructions that Judge Smith "should make the necessary determinations exclusively on the basis of the historical facts as found by the State Trial Court." Relator submits that insofar as this language indicates that the District Judge after considering the state record must erase from his mind all that transpired at the hearing he held, it is open conflict with the words of the Supreme Court in No. 22 in Brown vs. Allen, establishing the desirability of holding a hearing.

Even if the District Court may not contradict the state court's findings of basic or historical facts absent a "vital flaw" or "unusual circumstances" in the state proceedings, it should be free to hold a hearing to supplement the state court record if in its discretion it feels that a hearing "will better enable that court to determine whether any violation of the Fourteenth Amendment occurred."

This discretion in the District Court is essential if it is to properly fulfill its duties under the habeas corpus statute as interpreted in Brown vs. Allen.

As Justice Frankfurter points out, on mixed questions of law and fact and on the application of a constitution principles to the facts as found, the District Judge must exercise his own judgment. (Brown vs. Allen, 507). Since the District Judge must decide these questions, he should be able, in addition to studying the state records, to hold a hearing if he feels that having the witnesses before him will
407 better satisfy him on any issue. For example, in the instant case, the state denies that there is a casual relation between Captain Eagan's threat

to bring relator's wife down to the jail and relator's confession. (Appellant's Brief, pp. 30 and 31.) The District Judge must decide this issue. Therefore, he should be free to supplement his consideration of the evidence before the state court and the state court findings with a hearing if he feels it to be necessary.

The question now before the court is not whether the District Court should hold a hearing in this case. A hearing has already been held. The sole question raised in this petition is whether, having held a hearing, the District Court must disregard all the testimony these produced. This question cannot involve the federal courts in the "burdensome and useless repetition of effort" which Justice Frankfurter said was appellant's claim in No. 32 (Brown vs. Allen, at 504). Moreover, the testimony produced at the hearing is admittedly relevant to the issues to be decided by the District Court on the remand of this case; and concededly the entire proceedings were fair to the interests of the State of Connecticut. Justice demands that the information produced by the District Court's hearing be not ignored by that court for whatever help it affords in determining the issues left to its discretion by federal law.

II. THE VITAL FLAW AND THE BASIC FACT

This petition accepts, arguendo, that the District Court is bound by the basic facts found by the state tribunal—that is, specific findings of facts determined "by a recital of external events and the credibility of their narrators."—unless there is a "vital flaw" or "unusual circumstance" in the State proceedings. Relator urges this court to reconsider, however, the following portion of its opinion which might
408 be used to preclude the District Court from a complete determination of whether there is

such a flaw or circumstance in the state court proceeding:

> We can say that in our opinion nothing in this state record of appeal discloses such a "vital flaw" in the State court proceedings or any such "unusual circumstances," as those terms are used in Brown vs. Allen, as would warrant the federal court in holding a hearing de novo on the issue of the admissibility of the confessions.

At the outset it should be noted that the basic facts argument is really a basic fact argument. The state complains that the District Court overruled six of the basic facts found by the State court. (Appellant's brief, pp. 6 and 7.) It must be clear to this court, however, that facts number one, two and the first portion of four were not overruled by the court below. Facts numbered two, three and six are conclusions or inferences and "not a recital of external events." The basic facts argument, then, clearly refers to one fact: whether or not Rogers asked for counsel at the State's Attorney's office.

Rogers' testimony in the state tribunal in regard to his requests for counsel prior to Captain Eagan's arrival was uncontradicted. The State did not elect to challenge Rogers' testimony on this point with the available detectives until almost two and one half years after Rogers first testified. The fact that the State did not challenge Rogers' testimony dealing with occurrences from two to eight o'clock of the day in question is without dispute upon a consideration of the record below (59, 64, 66, 70). While this fact is not completely demonstrable from the incomplete state record which this court had before it, it will be

evident to the District Court upon consideration of the full state court record.

This court does not specifically reject relator's theory of a vital flaw because the opinion states:

> We can say that in our opinion nothing in this state record of appeal [record before Supreme Court of Errors] discloses such a "vital flaw" in the State Court proceedings or any such "unusual circumstances".

409 In view of the fact that the habeas corpus proceeding record discloses that the State did not challenge Rogers' testimony at the state trial, relator requests this court to clarify its holding on this point to eliminate any possibility that Judge Smith will be precluded from finding a vital flaw in these proceedings on remand.

The state court's specific finding—that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney;" (317) can only be upheld by saying that the court was free to disbelieve relator's testimony although it was uncontradicted. However, even in appellate review by the Supreme Court, the court would be free to go behind this finding, and to consider relator's uncontradicted testimony along with all undisputed facts. The Supreme Court states in Gallegos vs. Nebraska that:

> As the court has been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, the proper performance of that duty requires us to examine, in cases before us such undisputed facts as form the basis of a state court's denial of that right. Gallegos vs. Nebraska, 342 U.S. 55, 61 (1951).

> * * * [facts undisputed by the state] means not only admitted facts but also those that can be classified from the record as without substantial challenge.
>
> Ibid., 61.

And in Lisenba vs. California, 314 U.S. 219 (1941), the court held:

> Where the claim is that the prisoner's statement has been procured by such means [has been induced], we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. If the evidence bearing on the question is uncontradicted, the application of the
> 419 constitutional provision is unembarassed by a finding or a verdict in a state court. * * * Lisenba vs. California, 314 U.S. 219, at 237-238.

The district court in a habeas corpus proceeding should at least have the scope of review which the Supreme Court has on appeal. But the District Judge should not have to rely on the evidence which was presented before the state court to make its new determination. In a situation such as that in the present case where the relator was held isolated, surrounded by state officials, the only evidence he can produce is his own words. When the state tribunal elects not to believe him, although the state does not call the only witnesses who could contradict him, there is an ambiguity which is a "vital flaw" or "unusual circumstance" as these terms are used in Brown vs. Allen. The District Judge must be able to hold his own hearing to determine whether or not the witness is credible. In these circumstances, just as this court

pointed out was true in the Cranor case, justice will be better achieved by a procedure which permits observation of the witnesses. We respectfully ask this court to grant relator a rehearing, or to modify its opinion in accordance with this petition.

CERTIFICATE OF COUNSEL

I certify that the above petition is drawn in good faith—that to the best of my knowledge, information and belief there is good ground to support it, and that it is not interposed for delay.

LAWRENCE M. DOOLEY,
Public Defender of New Haven County,
Counsel for Relator.

411. In United States Court of Appeals for the Second Circuit

No. 59—October Term, 1957

Petition filed March 7, 1958.

Docket No. 24517

UNITED STATES EX REL. HAROLD D. ROGERS,
RELATOR-APPELLEE

v.

MARK S. RICHMOND, WARDEN, RESPONDENT-APPELLANT

Before: HINCKS, LUMBARD and WATERMAN, Circuit Judges.

On Petition for Rehearing

LAWRENCE M. DOOLEY, Public Defender for New Haven County, New Haven, Conn., for relator-appellee.

PER CURIAM DECIDED MARCH 13, 1958

Relator, through a petition for rehearing, has requested that we clarify our earlier opinion in this case in two respects.

Relator's first request concerns the following sentence in our opinion: "Unless the judge below
412 shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of Brown v. Allen, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the State trial court." He argues that this holding is contrary to Brown v. Allen, 344 U.S. 443, where Justice Reed indicated, page 478, that in one of the constituent cases there under consideration "[t]he District Court heard all additional evidence the petitioner offered. This was in its discretion." We think that by "additional" evidence, the opinion meant evidence material on the constitutional issue which the state trial court had excluded or as to which it had made no finding. To hold that by this dictum the Supreme Court meant to sanction unlimited discretion in the federal court on habeas corpus to take all evidence that the relator had already presented or could have presented in his trial, would be inconsistent with the rationale of Brown v. Allen.

Relator's second request is that we clarify our opinion so as to indicate that we did not wholly preclude the Judge below from finding a vital flaw in the state proceedings. Relator specifically refers to our sentence stating: "We can say that in our opinion nothing in this state record of appeal discloses such a 'vital flaw' in the State court proceedings or any such 'unusual circumstances,' as those terms are used in Brown v. Allen, as would warrant the federal court in holding a hearing de novo on the issue of the admissibility of the confessions." As the sentence shows, we limited our observation to the "state record on appeal." Nothing was said to insulate so

much of the state trial record as was not included in the record of appeal from examination for possible flaws.

In no respect do we deviate from our original opinion.

Petition denied.

413. In United States Court of Appeals for the Second Circuit

Present: Hon. CARROLL C. HINCKS, Hon. J. EDWARD LUMBARD, Hon. STERRY R. WATERMAN, Circuit Judges.

[Title omitted.]

ORDER DENYING PETITION OF RELATOR FOR REHEARING—MARCH 13, 1958

A petition for a rehearing having been filed herein by counsel for the relator-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

413a. [File endorsement omitted.]

421 In United States Court of Appeals for the Second Circuit

October Term, 1957

Case No. 59—Docket No. 24517

[Title omitted.]

MOTION OF COUNSEL FOR RELATOR TO WITHDRAW APPEARANCE—FILED MARCH 28, 1958

Counsel for Relator desires to withdraw his appearance in the above matter in that the Relator, Harold

D. Rogers, desires to apply for a Writ of Certiorari to the Supreme Court of the United States from the decision of this Court in the above matter.

Counsel for relator is Public Defender for New Haven County and as such has been unable to procure the necessary permission to proceed on the writ of certiorari under Section 333 of the Connecticut Practice Book.

Wherefore, said counsel desires to withdraw his appearance.

LAWRENCE M. DOOLEY,
Public Defender, New Haven County,
Counsel for Relator.

422 AFFIDAVIT OF LAWRENCE M. DOOLEY

I, Lawrence M. Dooley, being duly sworn, do depose and say:

1. That I am Public Defender for New Haven County in the State of Connecticut.

2. That I am counsel of record in the matter of U.S. ex rel Harold D. Rogers vs. Mark S. Richmond, Warden.

3. That under Section 333 of the Connecticut Practice Book I have been unable to secure necessary permission to proceed in this matter in a petition of writ of certiorari to the Supreme Court of the United States.

4. The relator, Harold D. Rogers, desires to institute an application for certiorari to the Supreme Court of the United States.

LAWRENCE M. DOOLEY.

State of Connecticut, County of New Haven, ss. Branford. 18th March, 1958.

Personally appeared before me the above named Lawrence M. Dooley, and made oath to the truth of the matters contained therein.

MARJORIE S. BARCLAY,
Notary Public.

423 [File endorsement omitted.]

426 In United States Court of Appeals for the Second Circuit

Present: Hon. CARROLL C. HINCKS, Hon. J. EDWARD LUMBARD, Hon. STERRY R. WATERMAN, Circuit Judges.

[Title omitted.]

ORDER GRANTING MOTION OF COUNSEL FOR RELATOR TO WITHDRAW AS COUNSEL FOR APPELLEE—MARCH 28, 1958

A motion having been made herein by Lawrence M. Dooley, Esq., to withdraw as counsel for the appellee,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

A. DANIEL FUSARO, *Clerk.*

427 [File endorsement omitted.]

438 [Clerk's Certificate to foregoing transcript omitted in printing.]

439 In United States Court of Appeals for the Second Circuit

No. 59—October Term, 1957

[Title omitted.]

Docket No. 24517

MOTION TO EXTEND STAY OF MANDATE—FILED MAY 1, 1958

Since pursuant to 28 U.S.C. Section 2101(c) Relator-Appellee in the above entitled action has ninety days from March 13, 1958, the date of this Court's denial of rehearing herein, to apply to the Supreme Court of the United States for a writ of certiorari, Relator-Appellee does hereby pray that the stay of the judgment of this Court, which is presently outstanding, be extended in all respects until the expiration of such ninety days, provided that upon receipt by the Clerk of this Court prior to the expiration of such ninety days of notice of the filing in the Supreme Court of an application for a writ of certiorari, the stay of mandate be further extended until the final disposition of the case by the Supreme Court.

LOUIS H. POLLAK,
Counsel for Relator-Appellee.

NOTICE OF MOTION (OMITTED IN PRINTING)

440 PROOF OF SERVICE (OMITTED IN PRINTING)

441 [File endorsement omitted.]

442 In United States Court of Appeals for the Second Circuit

UNITED STATES EX REL. HAROLD D. ROGERS,
RELATOR-APPELLEE

v.

MARK S. RICHMOND, WARDEN,
RESPONDENT-APPELLANT

Before HINCKS, LUMBARD and WATERMAN, Circuit Judges.

On motion to stay mandate.

LOUIS H. POLLAK, New Haven, Conn., for relator-appellee.

PER CURIAM—FILED MAY 1, 1958

This court, in an opinion filed February 20, 1958 and a supplemental opinion on rehearing filed March 13, 1958, vacated the order below, entered in a habeas corpus case which set aside a murder conviction in the State Court of Connecticut, and remanded for further proceedings below. On March 28, 1958, we granted relator's motion for substitution of counsel and for stay of our mandate for a term which under Rule 28(c)(1) of this court was limited to 30 days. Relator now moves that we stay our mandate for 60 days more.

We feel that a wise use of discretion requires us to deny the requested stay. Even if the Supreme Court shall see fit to grant certiorari, we think a proper regard for the State Process requires that the proceedings on remand shall go forward, if the State's Attorney so desires, simultaneously with the relator's prosecution of his proposed application for certiorari so that whatever may be the ultimate disposition on certiorari the State process may not be unnecessarily delayed.

However, in order that counsel for the relator may have opportunity to apply to a justice of the
443 Supreme Court for a stay, we will, and hereby do, order the mandate stayed for ten days. In all other respects it is

Ordered that the motion be denied.

U.S.C. JJ.

444 [File endorsement omitted.]

445 In United States Court of Appeals for the Second Circuit

Present: Hon. CARROLL C. HINCKS, Hon. J. EDWARD LUMBARD, Hon. STERRY R. WATERMAN, Circuit Judges.

[Title omitted.]

ORDER STAYING ISSUANCE OF MANDATE FOR AN ADDITIONAL TEN DAYS AND DENYING MOTION IN ALL OTHER RESPECTS—MAY 1, 1958

A motion having been made herein by counsel for the appellee to further stay the issuance of the mandate for an additional 60 days pending application for a writ of certiorari to the Supreme Court of the United States, and for other and further relief,

Upon consideration thereof, it is

Ordered that the issuance of the mandate be and it hereby is further stayed for an additional ten days.

Further ordered that in all other respects the motion be and it hereby is denied.

A. DANIEL FUSARO, *Clerk.*

446 [File endorsement omitted.]

447 [Clerk's Certificate to foregoing transcript omitted in printing.]

448 In United States Court of Appeals for the Second Circuit

UNITED STATES EX REL HAROLD D. ROGERS,
RELATOR-APPELLANT.

vs.

MARK S. RICHMOND, RESPONDENT-APPELLEE

On appeal from judgment of the United States District Court for the District of Connecticut

RELATOR-APPELLANT'S APPENDIX B—FILED JANUARY 14, 1959

LOUIS H. POLLAK,
127 Wall Street, New Haven, Connecticut,
JACOB D. ZELDES,
955 Main Street, Bridgeport, Connecticut,
Counsel for Relator-Appellant.

[File endorsement omitted.]

449 357 U.S. 220

Supreme Court of the United States

ROGERS *v.* RICHMOND, WARDEN

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—JUNE 16, 1958

Certiorari denied with statement as to effect of opinion of Court of Appeals in 252 F. 2d 807.
PER CURIAM.

The petition for writ of certiorari is denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown v. Allen*, 344 U.S. 443, 506 *et seq.*

In United States District Court for the District of Connecticut

UNITED STATES EX REL HAROLD D. ROGERS

v.

MARK S. RICHMOND, WARDEN, CONNECTICUT STATE PRISON

Civil Action No. 6294

MEMORANDUM OF DECISION ON MOTION FOR DISQUALIFICATION—JULY 16, 1958

Respondent moves that the writer disqualify himself from hearing any further proceeding in this case and refer the matter to another judge of this court. The basis of the motion is that this judge has a prejudgment of the issues in the case and a personal bias against the detectives involved and in favor of the cause of the relator Rogers. To support this claim and in attempted conformity with the requirements of 28 U.S.C. Sec. 144, the respondent, Mark S. Richmond, has made a sworn affidavit setting out alleged facts which are claimed to show this bias. Respondent also argues that on "retrial" the same testimony and issues will be involved and matters not enter-

tained may be within the scope of the prior knowledge of the judge and by reason of his prior
450 knowledge of the facts, his alleged opinion against the respondent's witnesses and of prior ruling and findings he would not be capable of exercising complete impartiality.

A federal judge is not disqualified from retrying or remand a case originally tried before him. Bushey & Sons v. Hedger Transp. Corp., 2 Cir., 167 F. 2d 9; Frank, Disqualification of Judges, 65 Yale L.J. 605 et seq.

Respondent also argues that a Connecticut statute precludes judges from sitting on a retrial of a case previously tried before them and that this is a substantive right which should not be denied the respondent in a federal forum. The qualification of federal judges is a matter, however, solely of federal law.

The affidavit filed is accompanied by a certificate by counsel for respondent that the affidavit is made in good faith.

28 U.S.C. 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be

shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The mere filing of the affidavit does not automatically disqualify the judge. He has the authority and the duty to decide whether the claim of bias is legally sufficient. Behr v. Mine Safety Appliances Co., 3 Cir., 233 F. 2d 371. Moreover, it is "well established that the statute is to be given the utmost of strict construction in order to safeguard the judiciary from frivolous attacks upon its dignity and integrity." U.S. v. Valenti, D. N.J. 120 F. Supp. 80, 83 (cases cited).

Before proceeding to the sufficiency of the affidavit the question arises as to its timeliness. 28 U.S.C. 144 provides that, "the affidavit shall be filed not less than ten days before the beginning of the term
451 at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." The alleged bias is claimed to have arisen during the course of proceeding. It is not timely, since filed in any event months after the rulings on trial which form the only basis for the affidavit. cf. Ex parte N. K. Fairbank Co. M.D. Ala. 194 Fed. 978.

On the merits, in determining the legal sufficiency of the affidavit there are four guiding rules which the court should follow:

"(1) The mere filing of an affidavit does not oust the judge from the cause,

"(2) The judge has the right to determine the legal sufficiency of the affidavit,

"(3) The bias or prejudice must be personal, i.e. antagonism or opposition to the litigant, or favoritism for his opponent,

"(4) Definite views on the law, adverse rulings in the case on trial, or adverse rulings against the suitor in other cases or in cases involving similar facts do not constitute such disqualifications, even in a criminal prosecution." U.S. v. Valenti, supra; Cole v. Loew's Inc., S.D. Cal. 76 F. Supp. 872.

The judge may pass upon the sufficiency of the affidavit, but not upon the truth or falsity of the facts alleged. Berger v. U.S., 255 U.S. 22; Tucker v. Kerner, 7 Cir., 186 F. 2d 79. Therefore in passing on the sufficiency of the affidavit the grounds alleged will be presumed as true for the purposes of this motion. The attack in substance is based upon the rulings of the court against the respondent, the failure to follow rulings of the state courts and the failure of the court to disbelieve the testimony of relator and believe the testimony of certain detectives. It is patently apparent that these claims fall within the fourth rule stated above. Because a judge has decided one case against a litigant is no reason why he cannot sit in another. Barnes v. U.S., 9 Cir., 241 F. 2d 252. In Chessman v. Teets, 9 Cir., 239 F. 2d 205, 215, the court stated that, "the conduct and rulings of
452 the trial judge in the case itself provide no basis for an affidavit of bias or prejudice."
See also U.S. v. Lattimore, D.C.D.C., 125 F. Supp. 295, 296. The United States Supreme Court in Ex Parte American Steel Barrel Co., 230 U.S. 35

at p. 44, states, "The statute authorizing the filing of an affidavit of bias or prejudice was never intended to enable a discontented litigant to oust a judge because of adverse ruling made, for such rulings are reviewable otherwise * * *."

The rulings of this court have been reviewed by the Court of Appeals and by the Supreme Court of the United States. These courts have remanded this case to this court with instructions as to the procedure in determining certain issues.

It is not bias which disqualifies a judge from hearing a case but "personal bias." Knapp v. Knisey, 6 Cir., 232 F. 2d 458; Craven v. U.S., 1 Cir., 22 F. 2d 605, cert. den. 276 U.S. 267. In Tucker v. Kerner, 7 Cir., supra, at 84, Chief Judge Lindley speaking for the Court states;

> Every member of this court, every member of any court, every judge, when he hears a case or writes an opinion must form an opinion on the merits and oft times no doubt an opinion relative to the parties involved. But this does not mean that the judge has a "personal bias or prejudice." If it did, the disqualification of judges would be a matter of every day rather than unusual and extraordinary occurrence which the statute is designed to meet.

Compare In re Federal Facilities Realty Trust, N.D. Illinois, 140 F. Supp. 522.

In In re Linahan, 2 Cir., 138 F. 2d 650, Judge Frank, speaking for the court, dismissed a claim of bias against a special matter. His words are appropriate here. He said at 651:

Appellants entertain a fundamentally false notion conception of the prejudice which disqualifies a judicial officer.

Democracy must, indeed fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions, attitudes which precede reasoning in particular instances and which therefore, by definition, are pre-judices. Without acquired "slants", pre-conceptions, life could not go on.

* * * * * *

453 The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.

* * * * * *

But, just because his fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them, to form attitudes towards them. He must do his best to ascertain their motives, their biases, their dominating passions and interests,

for only so he can judge of the accuracy of their narrations. He must also shrewdly observe the strategems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgment of the actors in those court-room dramas called trials, he could never render decisions.

His findings of fact may be erroneous, for, being human, he is not infallible; indeed, a judge who purports to be super-human is likely to be dominated by improper prejudices. When upper court judges on an appeal decide that the findings of a trial judge are at fault because they—correctly or incorrectly—think those findings insufficiently supported by relevant and competent evidence, that appellate decision does not brand him as partial and unfair. When, his decision reversed because of errors in his findings of fact or conclusions of law, the case comes back to his court for a further hearing, he will not, if he is the kind of person entitled to hold office as a judge, permit his previous decision in the case to control him.

A motion to disqualify a judge for bias and prejudice is a serious undertaking, as evidenced by the fact that it must be in affidavit form, with a certificate of counsel.

The memorandum of the United States Supreme Court in denying certiorari left for the determination

of this court under the law the question of whether to follow or not to follow the determination of the State Court.

454 The Connecticut statute mentioned has no force or effect on the procedure to be followed in assigning judges in a federal court. This argument is without merit and frivolous. The federal statute provides a method whereby a litigant, with grounds for belief that one judge of a district is personally biased or prejudiced against him or in favor of his opponent, may prior to a court term file an affidavit to that effect so that that judge may not sit in his case. It is not intended to permit counsel, dissatisfied with rulings in the course of a case, by inducing a litigant to sign an affidavit attacking the rulings and attacking the judge's integrity, to terminate the proceedings before that judge and start over before someone else.

Questions posed by those cases brought to test the constitutionality of state court rulings are not easy. Neither their difficulty nor the sort of attack made in the instant affidavit, however, would justify transferring the burden to another judge without the fulfillment of the statutory requirements, for it is the duty of the judge to act if the motion is based on insufficient grounds. Tucker v. Kerner, supra; Eisler v. U.S., D.C. Cir., 170 F. 2d 273, 278; U.S. v. Murphy, W.D. Mo., 19 F. Supp. 987, 988; U.S. v. Valenti, supra; In re Federal Facilities Realty Trust, supra; U.S. v. Shipley, 112 F. Supp. 734, 748.

The affidavit is ordered stricken as insufficient.

The motion is denied.

Dated at Hartford, Connecticut, this 16th day of July 1958.

United States District Judge.

455 In United States District Court for the District of Connecticut

UNITED STATES EX REL HAROLD D. ROGERS

v.

MARK S. RICHMOND, WARDEN OF CONNECTICUT STATE PRISON (SUBSTITUTED RESPONDENT)

Civil Action No. 6294

MEMORANDUM OF DECISION ON REMAND—OCTOBER 13, 1958

By writ of habeas corpus, this court set aside a state court judgment on a jury finding of relator's guilt of murder in the first degree, by reason of lack of due process through the use of two confessions found by the state trial court to have been voluntary, but found after hearing by this court to have been not voluntary. The Court of Appeals reversed, remanding for consideration of the entire record of the proceedings before the state courts, a portion of which, the testimony and the findings of the trial judge on the issue of the voluntary character of the two confessions, had not been placed in evidence at the hearing here. U.S. ex rel. Rogers v. Richmond, 252 F. 2d 807 and 812. The Supreme Court denied certiorari, with a brief opinion. Rogers v. Richmond, 357 U.S. 220.

The remand of this matter to this court for further proceedings in accordance with the opinion of the Court of Appeals has left some doubt as to the meaning of the language employed by that court in both its original opinion and the opinion on rehearing.

The Court of Appeals felt that this court had followed improper procedure in holding a hearing de novo without first calling for the entire record of the state trial proceedings (or at least those sections

pertinent to the coerced confession issue, including testimony at the preliminary hearing before the trial judge on that issue), and in making its decision that relator was entitled to have the judgment of conviction set aside on the basis of testimony adduced at this hearing, rather than on the basis of the state trial record. The Court of Appeals relied on its interpretation of Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469, a case in which the Supreme Court discussed the procedures to be followed by a United States District Judge when he is dealing with a state prisoner's application for a writ of habeas corpus. According to the Court of Appeals, Brown v. Allen requires a District Judge to call for and examine the state trial record in such cases. It further held:

> Unless the judge below shall find in the record thus before him material which he deems to constitute "vital flaws" and "unusual circumstances" within the meaning of Brown v. Allen, we hold that he should make the necessary constitutional determinations *exclusively* on the basis of the historical facts as found by the State trial court. Brown v. Allen, 344 U.S. at pages 507, 508 * * *. 252 U.S. at 811. [Emphasis supplied.]

This would appear to be a clear command to the court below to proceed as follows:

1st, Obtain the state trial record.

2nd, Examine same to determine whether the state proceedings were marred by some "vital flaws" or "unusual circumstances."

3rd, Should this examination reveal no such flaws or circumstances, then the court must confine itself to analyzing the historical facts as found by the state

trial court as the basis of determining the constitutional question raised by relator's petition.

4th, Alternatively, should the examination reveal the existence of such a flaw or of such circumstances, then the court is allowed to go outside the state record and to hold a hearing on the same issues that were tried in the state trial court, if the court, in its discretion, decides that a trial de novo of these issues is necessary.

If there were any doubt that the use of the word "should" added anything but a mandatory spirit to this paragraph, that should be dispelled by the word "exclusively" as it is used to describe the method by which the court is to make the constitutional determination. The Court of Appeals did not recede from this position in denying relator's petition for rehearing. In that petition relator had argued that the opinion previously issued was in conflict with
457 Brown v. Allen, the very opinion relied on by the Court of Appeals. It appears that relator relies on Brown v. Allen as providing authority that the District Judge has discretion to hear such evidence as the parties choose to offer at the federal hearing, including evidence on issues already heard in the state court and which is, of course, in the state record. The Court of Appeals stated in its supplementary opinion that it did not read Brown v. Allen as relator did; that any "additional evidence" heard by the District Judge, in the absence of a vital flaw, etc., had to be confined to evidence material on the constitutional question which the state court had excluded or as to which it had made no finding. Relator's bid for certiorari was denied by the Supreme Court. However, contrary to its usual practice, the Supreme Court issued a brief statement with the denial, designed, apparently, to guide the courts below

by explaining how the members of the Court interpreted the opinion of the Court of Appeals:

> On consideration of the petition for a writ of certiorari herein to the United States Court of Appeals for the Second Circuit, it is ordered by this Court that the said petition be, and the same is hereby denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See Brown v. Allen, 344 U.S. 443, 506, et seq. Rogers v. Richmond, 357 U.S. 220 (June 16, 1958).

This "interpretation" by the Supreme Court, on its face, seems to mean that the District Judge, after examining the record of the state proceedings, is free to accept the state factual determinations in those proceedings and base his constitutional determination thereon, or to reject them and call for testimony on which to base his constitutional determinations, unless his examination of the state proceedings reveals some "vital flaw", in which instance the implication is that he cannot accept the state determination but *must* call for testimony. This, essentially is relator's present position. See Comment to the same effect (that the Supreme Court rejected any limitation on the discretion of the District Court) 58 Columbia Law Review 895.

458 Yet if that were so there would be no bounds on the exercise of the judge's discretion, although the Court sought to define some such bounds in Brown v. Allen. The Supreme Court's allusion to the discussion on p. 506 et. seq. of that opinion emphasizing the possibility that the facts have been tried

and adjudicated against the applicant, and implying that their determination may well be accepted in the absence of a vital flaw in their state court determination points to a standard to be followed. Whether we call it a vital flaw or unusual circumstance, or a substantial ground for exercise of judicial discretion in granting a hearing, something must appear upon examination of the state court record to require a trial de novo of the fact issues. While the comment of the Supreme Court in denying certiorari guards against too narrow an interpretation of Brown v. Allen, it can hardly have been intended to sanction complete rejection of the Court of Appeals' insistence on consideration of the full state court record in determining whether grounds exist for a hearing, or we should have had a more extended discussion of the reason for so flat a disagreement with the reasoning of the Court of Appeals. Unless, on consideration of the full record such grounds are found, this court must accept the findings of historical fact in reaching its determination on the constitutional issue. This court is bound by the findings of the state trial court that no request for counsel was made, and that the confessions were voluntary, unless some vital flaw or unusual circumstance exists or some other basis appears for consideration of testimony outside the record. The Court of Appeals requires examination of the state court record in full before determining whether to take additional testimony. The Supreme Court refused review of the ruling of the Court of Appeals but makes it plain that there may be circumstances in which the judge may, after review of the state court record, decide to take testimony and not be bound by the state court findings, even though no

vital flaw is necessarily found. Circumstances must be shown to justify such a course, however.

459 Thomas v. Arizona, 356 U.S. 390, indicates that the holding of a hearing is within the trial judge's discretion. In that case the judge did not hold a hearing, and this was held not an abuse of discretion. In the absence of a hearing, the Supreme Court could review only on the undisputed facts in the state court record. In the case at bar a hearing was held and findings made at variance with the state court's historical findings. The hearing, however, was held without a review of the full state court trial record to determine whether grounds existed for exercise of discretion to hold a hearing de novo. This course was disapproved by the Court of Appeals, which remanded for preliminary consideration of the full state court record to determine whether vital flaw or unusual circumstance exists. The Supreme Court refused certiorari, with the comment already quoted.

So the question here is whether on review of the full trial court record, testimony should be considered in a trial de novo. The state trial court fully heard the evidence on the underlying facts surrounding the confessions and concluded they were voluntary. Some weight appears to have been given to the finding that the circumstances were not such as to be likely to elicit untrue confessions. In view of the finding that Rogers never did ask for counsel, however, it is not likely that the finding on the probability of truth had any real effect on the outcome. The sense of the Supreme Court's interpretation of the language of the Court of Appeals is that while the District Judge may take additional testimony not considered by the state trial court on constitutional issues, such as lack of due process by the use of coerced confessions, and make an independent determination of the facts, such

as the voluntary character of confessions, and must independently determine whether the conviction may constitutionally stand, he may not substitute his judgment on factual issues fairly tried (i.e. where no vital flaw exists) before the state court, on similar evidence. If the issues were not fairly tried, or if important evidence exists which the trial court did not have before it, grounds would exist for exercise of discretion to re-try the factual issues. As to those issues
463 he is required by the ruling of the Court of Appeals, unless grounds are found in the record for exercise of discretion to re-try them, to take the state court's findings, fairly made, as the basis for consideration of the constitutional issues.

The court now has before it the complete state court record, including those portions not before this court at the habeas corpus hearing. The question is whether that record shows any lack of fair hearing or procedural due process, or other basis for this court in its judicial discretion to consider evidence outside the state court record. On the question of vital flaw or unusual circumstance in the state court proceedings, relator's principal reliance is placed on the defective finding (No. 101) made some five months after trial, with reference to request for counsel. It is true, as relator claims, that the positive finding of no request has no support in the evidence for the time (some seven hours) prior to Chief Eagan's arrival, since the only testimony as to that period was Rogers' testimony that he had made the request. However, the burden was on Rogers, and elimination of the positive finding of no request would leave him no better off, if the judge disbelieved his testimony, as he appears to have done. The judge ruled at the conclusion of the hearing that the confessions were voluntary, even though the formal findings were not

made until months later. This court on trial of the same issue de novo credited Rogers' statement that he had asked to see his counsel, although the recollection of the police officers at that time, some two and one-half years after the questioning, was that he had not made such a request. It is quite natural for their recollection after so long a period to coincide with the version they must subconsciously prefer. The probabilities are strong that a prisoner represented on another charge by able counsel of many years experience as public defender, when questioned intermittently for hours on the commission of a capital crime would ask to see his lawyer. In that respect the subordinate findings differ. Such a finding depended on observation of Rogers on the stand and judgment as to Rogers' credibility as a witness. There
461 was no unfairness or lack of due process in the consideration of this issue in the state court, although on similar evidence, if properly before it, this court would reach the opposite finding. It was the conclusion of the state court that the confessions were voluntary. In reaching this conclusion some weight seems to have been given to the finding that they were not so obtained as to be likely to be untrue. The majority opinion of the Supreme Court of Errors appears to give approval to the consideration of their probable truth as a factor in their admissibility. This was not, however, necessary in determining their admissibility, in view of the findings as to their voluntary character. Were these confessions the free and voluntary acts of Rogers or was his will so overborne by pressures that they should be considered the product of coercion? The state court decided the former, this court would find the latter on underlying facts found, differing in the respects mentioned, if this court were free to reject the state court findings

and try the issue de novo. The pressures used, aside from the deprivation of counsel, were not as great as those used and condemned in many cases. Yet, there was the illegal removal from the jail to the office for interrogation, the illegal holding incommunicado, denial of access to his lawyer, questioning by different officers for some eight hours intermittently, in relays, the faked phone calls about his wife and children, finally succeeding by inducing Rogers to abandon his denials and make the confession, repeated the next day before the coroner. Aside from the denial of access to counsel, the other circumstances might not singly or together have broken down his resistance. On the facts as they appeared to this court, taken together, against the background of his knowledge that although he had counsel he would not be permitted to reach him, it seemed reasonable to conclude that they overbore his will to resist and brought about a confession not truly voluntary or free. . .

Considering the full state trial record anew, to determine whether other evidence should be considered, however, and ignoring as we must for this purpose the impressions made on the trial here, there do not appear to be any circumstances which under the limitations now applied would permit retrial
462 here of the issue of voluntariness of the confessions. The issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge. Subsequent disagreement with his weighing of essentially similar evidence is not in itself sufficient under the limitations now imposed in the interest of proper balance in our dual court system, to permit consideration of the matter heard at the trial of the issue de novo here.

The writ may be discharged, the petition dismissed, and relator remanded to the custody of respondent. A certificate of probable cause for appeal may issue.

It is so ordered.

Dated at Hartford, Connecticut, this 13th day of October 1958.

J. JOSEPH SMITH,
United States District Judge.

In the Superior Court for the County of New Haven

TESTIMONY OF PATTERSON AND REDDING GIVEN IN THE STATE TRIAL COURT

(Of the testimony relating to the voluntariness of the confessions given in the state trial court in the absence of the jury, the testimony of Deputy Jailer Patterson [St. Tr. Tr. pp. 468–476] and Sheriff Redding [St. Tr. Tr. pp. 526–529] is the only portion which was not presented to the District Court at the August 31, 1956 hearing. The testimony of Deputy Jailer Patterson and Sheriff Redding, which is set forth below, was received in evidence in the District Court on July 15, 1958.)

463 DANIEL J. PATTERSON, called as a witness by counsel on behalf of the accused in the absence of the jury, being first duly sworn; testified as follows:

Direct examination by Mr. CORSE:

Q. Sit down, please. Where do you live, Sir?

A. 246 West Hazel Street, City.

Q. What is your position?

A. Deputy Jailer.

Q. Of the New Haven County Jail?

A. Of the New Haven County Jail.

Q. Have you at my request brought with you the papers under which Harold Rogers has been held at the New Haven County Jail?

A. I have.

Q. May I see them, please?

A. Which one?

Q. Well, I would like to see them all and then perhaps we can take them up one at a time. Perhaps we can simplify matters if you will show me which of these commitment papers that you have brought with you was in effect on January 30 of this year. [Witness handing a paper to Mr. Corse.]

Q. You're handing me a paper which apparently bears on the outside the date January 13, 1954, Mittimus, State Against Harold Rogers; is that correct?

A. That's right.

Q. And a penciled notation in the upper right hand corner, No. 1. Is that your notation?

A. That's my clerk's notation.

Q. Could I separate these two papers, Mr. Patterson?

A. You can.

Mr. CORSE. I offer this mittimus.

Mr. ULMAN. No objection.

The COURT. I think there are two exhibits——

Mr. CORSE. I think this will be exhibit 3.

464 The COURT. All right, exhibit 3.

(The mittimus referred to was received in evidence and marked Defendant's Exhibit 3.)

Mr. CORSE. This, may it please the Court, is a mittimus from the City Court, City of New Haven. This shows a bind-over on probable cause to the Superior Court, to this April term.

Q. Mr. Patterson, when this mittimus was received at the jail were any of these apparently rubber-stamped items on the back on it?

A. This one [indicating].

Q. When you say "this one," you're referring to what is apparently an officer's return saying that he

delivered Harold Rogers to the jail in accordance with this mittimus; is that correct?

A. January 13.

Q. And this other at that time was not on it; is that correct?

A. No, it was not.

Q. Now, what is this other stamped item on the back of the mittimus?

A. It is to the keeper of the New Haven County Jail that somebody in authority is removing the inmate from the jail.

Q. Whose signature appears on there?

A. Edmund S. Flanagan.

Q. Do you know who Edmund S. Flanagan is?

A. County Detective.

Q. And by what authority, apart from that signature, if you have any authority, was Rogers released to Detective Flanagan on that day?

A. A letter addressed to me from the State's Attorney's Office [handing].

Mr. CORSE. I offer this letter [handing].

Mr. ULLMAN. No objection.

The COURT. It may be marked exhibit 4.

(The letter referred to was received in evidence and marked Defendant's Exhibit 4.)

465 Mr. CORSE. Mr. Ullman, if you have no objection to this, these documents that I have put in are all that are immediately concerned in this problem. It is probable that you and I can agree that the remainder of the mittimuses we will be interested in—may they be introduced for identification now in order to avoid calling him in the future?

Mr. ULLMAN. No, I have no objection. I would like to look at them in case I want to ask any questions.

The WITNESS. You want the next mittimus in its proper sequence?

Mr. CORSE. Yes.

(A paper was handed to Mr. Corse by the witness.)

Mr. ULLMAN. I have no objection to that.

Mr. GORMAN. What is the date on that?

Mr. ROBINSON. January 31.

Mr. CORSE. May this be marked for identification, if the Court pleases?

The COURT. Exhibit 5 for identification.

(The mittimus referred to was marked Defendant's Exhibit 5 for identification.)

Mr. CORSE. Defendant's Exhibit 5 for identification, may it please the Court, is a coroner's warrant dated January 31, 1954.

Mr. ULLMAN. It is actually a mittimus, is it not, committing him to the County Jail?

Mr. CORSE. It does commit him to the County Jail, which is the usual effect of a coroner's warrant, as I understand.

Q. The next one, Mr. Patterson, please?

(A paper was handed to Mr. Corse by the witness.)

Mr. CORSE. May this be marked for identification?

Mr. ULLMAN. This is the bench warrant issued on the murder indictment.

466 Mr. CORSE. Yes.

The COURT. That may be marked Exhibit 6 for identification.

Mr. ULLMAN. I should say it is a mittimus issued on the indictment rather than the bench warrant.

(The mittimus referred to was marked Defendant's Exhibit 6 for identification.)

Mr. CORSE. That is dated March 2, 1954, for the record.

Q. Now, Mr. Patterson, have you any document in your possession which shows by what authority Mr. Rogers was transported to the coroner's office?

A. Transported to the coroner's office?

Q. To the coroner's office.

(A paper was handed to Mr. Corse by the witness.)

Q. [Indicating.]

A. Oh, to the coroner's office? No, I haven't.

Q. Is there such authority, written authority, in existence? The date, I believe, was January 31, if that will help you in your search?

A. Yes, I have it here. Mr. Rogers was taken to the coroner's office on January 31.

Q. Did you receive any written authority at the jail for that transportation?

A. No.

Q. That document that you referred to, Mr. Patterson, when I asked you whether you had such a record with regard to Mr. Rogers going to the coroner's office, is that something, some notes you prepared for your own use?

A. These here? [Indicating.]

Q. Yes.

A. Yes.

Q. I see. It's just a record of what was done with or to Mr. Rogers?

A. From January 11 up to the present date.

Q. And that was made for your own assistance?

A. Just for my own convenience.

Q. Yes. Have you any record, Mr. Patter-
467 son, of what time the coroner's warrant was lodged at the jail?

A. I have not.

Q. Would any record at the jail show that?

A. No, it would not.

Q. The time?

A. No.

Q. Do you keep a record book at the jail of official papers that are received at the jail?

A. Commitments in and out.

Q. Is the time marked on that book?

A. There is a log kept on it.

Q. Would the log show when the coroner's——

A. No, it would not.

Q. Would that record show the date on which the coroner's warrant was received?

A. No, it would not.

Q. Is there any record that would show the date on which it was received at the jail?

A. None, only the date on the mitt.

Q. Referring, then, to Defendant's Exhibit 5 for identification, is that the date there, the date on which it was received at the jail?

A. Could be.

Q. Well, is it or——

A. Yes.

Q. You would have no record indicating what time it was received, however?

A. No, I have not.

Q. Do you have any memory of what time it was received that day?

A. I have none. It was a Sunday and I wasn't around there, only parts of the day, parts of the morning.

Mr. CORSE. I think you may inquire.

Cross-examination by Mr. ULEMAN:

Q. Do you know who brought the accused down from the jail to the coroner?

A. On January 30——

Q. No, I said to the coroner. That was on January 31, was it not?

A. Yes.

468 Q. You don't know?

A. No.

Q. You don't know whether the high sheriff brought him down?

A. I don't know.

Q. On that Sunday?

A. I don't know who took him.

Q. Were you on duty that day?

A. In the morning. I came in a couple of times in the morning, but in the afternoon I wasn't there.

Q. And insofar as this delivery of the prisoner to the State's Attorney's Office on the 30th, was that done in accordance with the usual procedure?

A. It was.

Q. And practice?

Mr. ULLMAN. No further questions.

Redirect examination by Mr. CORSI.

Q. Mr. Patterson, is the log book to which you referred available?

A. Is it available?

Q. Do you have the——

A. Yes, on the commitments in and out.

Q. That is up at the jail?

A. Yes.

Q. And would it be available, if we needed it?

A. It would not specify any particular names, like City Court commitments. They come in the aggregate.

Q. Would you be in a position to arrange, Mr. Patterson, to have Mrs. Eichler, who is the clerk at the jail; is that correct?

A. Yes.

Q. [Continuing]—bring down that log book? She showed something to Mr. Robinson and me on the log book that indicates the information to me that I'm trying to get.

A. If she did, that's unbeknown to me.

Q. I didn't say you did know about it. Don't misunderstand me. We asked her about it as little as within the past two weeks—I have forgotten the exact date—and she did show us something, and I think that should be before the Court.

A. What is the question?

469 Q. The question is, can you arrange to have Mrs. Eichler bring that book down?

A. Oh, certainly.

Mr. CORSE. I'm sorry to delay this matter.

Mr. ULLMAN. This matter with reference to the log book does not apply to this.

Mr. CORSE. It does not apply to this situation.

Mr. ULLMAN. So there won't be any delay.

Mr. CORSE. There won't be any delay. I was getting confused as to what we were dealing with. It doesn't apply to this present problem.

Mr. ULLMAN. Is there anything further with this witness?

Mr. CORSE. Nothing further.

Thank you, Mr. Patterson. I'll be in touch with you when we want the book. Just a minute, would you leave those documents? They have been marked in evidence.

The WITNESS. I would like to have some form of receipt for them, please.

Mr. CORSE. I'll be glad to make out any form that will satisfy you. I think that can be done at recess rather than take up the Court's time with it.

Q. Just one question. Do you know how that coroner's warrant was delivered to the jail? By mail or in person or what?

A. I have no knowledge.

Q. Do you know who would know? Do you know who would know that?

A. I don't.

Mr. CORSE. I have nothing further.

Re-cross-examination by Mr. ULLMAN:

Q. Did you ever receive a coroner's mittimus by mail?

A. Yes.

Q. You did? When?

A. On several occasions.

Q. You don't know whether this was received by mail?

A. I have no knowledge.

470 Q. Do you know that this came in on a Sunday?

A. It could have.

Mr. ULLMAN. Nothing further.

JAMES P. REDDING, called as a witness by counsel on behalf of the accused, being first duly sworn, testified as follows:

Direct examination by Mr. CORSE:

Q. Will you state your full name, please?

A. James P. Redding.

Q. And you are the sheriff of New Haven County?

A. That's correct.

Q. And as such do your duties include supervision and control of the New Haven County jail?

A. It does.

Q. And the prisoners therein?

A. It does.

Q. Were you acting in that capacity on January 31 of this year?

A. I was.

Q. Were you at the jail that day?

A. I was.

Q. Did you see me there?

A. I did.

Q. What time did you first see me that day?

A. Well, I would say approximately eleven o'clock or thereabouts.

Q. Some time before noon, in any case?

A. That's right.

Q. Did you have any conversation with me?

A. Yes, I think you asked to see Mr. Rogers.

Q. Did you give me the permission I requested?

A. I did not.

Q. Did you make any telephone call in connection with my request?

A. No, I think I told you he was incommunicado, but I did make an attempt to call the State's Attorney's office and wanted to be sure of the status of incommunicado and I was told——

Q. Just a moment, Sheriff Redding. To
471 whom did you speak at the State's Attorney's office?

A. I think I talked to Mr. Ullman.

Q. What did you ask Mr. Ullman? What did you say to him?

A. I told him you were there and I wanted to make sure that the incommunicado status would either permit you to go in or whether he held a total objection to everybody, and I was told then, I think, that the coroner would be the only one who could get permission.

Q. In an effort to refresh your recollection, Sheriff Redding, isn't what you said to Mr. Ullman, as a matter of fact, "Corse is here wanting to see Rogers; should I let him see him"?

A. I might have said that.

Q. And didn't Mr. Ullman say "No"?

A. No, he said permission would have to come from

the coroner as he was holding the prisoner incommunicado.

Q. Now, what process was Rogers held at the jail at that time under?

A. Under the coroner's instructions.

Q. I didn't ask whose instructions. I said what process, Sheriff, what paper?

A. Well, that was his last paper we had. I think that was one on that robbery, if I remember correctly.

Q. Showing you Defendant's Exhibit 3, Sheriff, is that the process under which Rogers was held at that time?

A. That's right.

Q. Had there been at that time lodged in the jail Defendant's Exhibit 5 for identification, which is the coroner's warrant in this case? [Handing.]

A. Will you ask your question again, Mr. Corse.

Q. Had at the time you and I had our conversation that warrant which I now hand you, Defendant's Exhibit 5 for identification, been lodged at the jail or were you——

472 A. No, not at that time.

Q. What was the answer?

A. Not at that time.

Q. When was it so lodged?

A. It came in, if my information is correct, at approximately one o'clock, I think. Approximately that time.

Q. Was that at some time after I had left the jail?

A. Shortly after you left the jail.

Q. While I was present in the jail that day, Sheriff, to your memory did anyone else come in seeking to see Rogers?

A. Yes, I think a couple of officers came in to take pictures, I think.

Q. Were they permitted to take those pictures?
A. Not to my knowledge.
Q. Were you there when they arrived?
A. That's right, we both were.
Q. Do you recall them going into the cell block, in through the outer door?
A. No, I don't recall that at all.
Q. Would you say definitely that they did not?
A. No, I know I went into my office after I told them that the prisoner was on an incommunicado status and I couldn't do anything about it, and then I walked into my office. I don't think they got in, although I can't positively say no.
Mr. CORSE. You may inquire.
Mr. ULLMAN. No questions.

473 In United States District Court for the District of Connecticut

UNITED STATES EX REL HAROLD D. ROGERS, REALTOR

v.

MARK S. RICHMOND, WARDEN, RESPONDENT

Civil Action No. 6294

MEMORANDUM OF DECISION ON MOTION FOR ADDITIONAL FINDING—NOVEMBER 16, 1958

Relator moves for additional finding as to the witnesses who testified on the voluntariness of confessions in the state trial court, as to the portion of their testimony not submitted to this court at the August 31, 1956 hearing and as to the fact of testimony by two witnesses before this court. This matter all appears of record and appears rather a question of emphasis in argument on the basis or lack of basis

of conclusions reached, rather than matter for further findings.

Motion denied.

Dated at Hartford, Connecticut, this 10th day of November, 1958.

J. Joseph Smith,
United States District Judge.

474 In United States District Court for the District of Connecticut

Docket Entries

Civil Docket: Harold D. Rogers v. George A. Cummings et al

Petition for Writ of Habeas Corpus filed. [8/22/56]

Order for Writ of Habeas Corpus entered. Smith, J. Writ issued and handed Marshal with copies of same and of order. [8/24/56]

Copies mailed Atty. Robinson & State's Attorney for New Haven County. [8/25/56]

Hearing for Petition for Habeas Corpus commences. Respondents Return filed. Petitioner's exhibits A through F filed. Three witnesses for Petitioner sworn and testified. Three witnesses for Respondent sworn and testified. Respondent's exhibit 1 filed. Summation 3:08–3:27 P.M. Decision reserved on writ. Petitioner returned to the custody of the Respondent pending final determination. Smith, J. [8/31/56]

Memorandum of Decision on Writ of Habeas Corpus entered. Smith, J. (Judgment of conviction may be set aside). Copies given State's Atty., and Thomas Robinson, Public Defender. [9/20/56]

Judgment entered for the Relator, approved by the

Court, on the merits providing that the judgment of conviction and the death sentence imposed upon said relator by the Superior Court for the County of New Haven, be vacated; that relator be discharged from the custody of the respondent unless relator is granted a new trial within sixty days after receipt of a mandate of the Court of Appeals and/or of the Supreme Court of the United States affirming this judgment. Earl, C. Attested copies thereof mailed to counsel for the relator and for the respondent. [10/2/56]

Motion to Amend and Supplement Findings and for a Rehearing filed by respondents, and Notice of Motion filed. [10/11/56]

Present Warden, Mark Richmond, substituted as party respondent for Mr. Cummings. Respondent's Motion to Amend Findings and for Rehearing. Decision reserved. Briefs to be submitted in one week. Smith, J. [10/29/56]

Memorandum of Decision on Motion to Amend Findings and Motion for Rehearing filed in Hartford. Copy given to Mr. Ullman in Hartford, Mr. Robinson in New Haven. [11/14/56]

475 Certificate of Probable Cause entered. Smith, J. [11/16/56]

Notice of Appeal filed. [11/16/56]

Bond for Costs on Appeal, filed. [11/23/56]

Court Reporter's notes filed in Hartford. Sanders, R. [11/28/56]

Petition for Extension of Time for Docketing Record on Appeal filed by respondent. [12/17/56]

Motion to Settle Record on Appeal and Notice thereof filed. [12/20/56]

Hearing on Respondent's Motion to Settle Record on Appeal. Motion granted. Respondent's exhibits AA, AB, AC and AD marked for identification. Smith, J. [1/14/57]

Order extending time for filing the Record on Appeal and docketing the appeal entered. Smith, J. [1/30/57]

Record on Appeal sent to U.S. Court of Appeals. [2/13/57]

Court Reporter's notes filed in Hartford (Miller, R.) [1/16/58]

Judgment of U.S. Court of Appeals vacating order of U.S. District Court and remanding action for further proceedings, filed and entered. Fusaro, C.U.S.C.A. [3/14/58]

A true copy of order U.S. Court of Appeals recalling its earlier mandate entered in the above entitled case filed, Fusaro, Clerk. [4/2/58]

A true copy of the judgment of the Court of Appeals filed in this court on March 14, 1958, returned to Appellate Court. [4/2/58]

A true copy of the judgment of the U.S. Court of Appeals returned and filed, providing that judgment of this court be vacated and the action be remanded for further proceedings in accordance with the opinion of said court. Fusaro, Clerk. [6/21/58]

A true copy of the decision of the U.S. Court of Appeals on appellees' petition for rehearing filed. Fusaro, C. [6/27/58]

Photostatic copy of a true copy of the order of the Supreme Court of the U.S. entered on petition for certiorari filed. Fusaro, C. [6/27/58]

Received Record on Appeal from U.S. Court of Appeals. [6/28/58]

Motion for Disqualification and Notice of Motion filed by Respondent. [7/9/58]

476 Motion for leave to proceed in forma pauperis filed by Relator. [7/9/58]

Motion for appointment of counsel filed by relator. [7/9/58]

Motion to comply with mandates of Court of Appeals and Supreme Court by supplementing the record filed by relator. [7/9/58]

Hearing on Respondent's Motion for Disqualification. (1) Motion for Appointment of Counsel—No objection. Motion granted. Mr. Pollak appointed. (2) Motion for Leave to Proceed in Forma Pauperis—No objection, Motion granted. (3) Motion for Disqualification—Hearing not concluded. Relator's exhibit 101 marked for identification. Smith, J. [7/14/58]

Continued hearing on Motion for Disqualification. One Relator witness sworn and testified. Motion for Disqualification denied. Affidavit ordered stricken. (Written Memorandum of Opinion will be filed by Judge Smith.) Motion to supplement record and comply with Mandates of Court of Appeals and Supreme Court heard. Motion granted as follows:—Pages 314 to 320, and 230 to 263 of Relator's exhibit 101 for Identification and pages 468 to 484 and 526 to 534 of State Trial transcript are added to the record. Briefs as to what additional evidence is to be included in record and the effect of Supreme Court opinion in denying certiorari to be submitted by September 2, 1958. The Court will then rule as to the need of a further hearing. Smith, J. [7/15/58]

Memorandum of Decision on Motion for Disqualification entered. Smith, J. Affidavit is ordered stricken as insufficient, motion denied. Copies mailed to Louis H. Pollak, 127 Wall St., and Abraham Ullman, State's Attorney, New Haven County. [7/17/58]

Order entered that transcript of hearing on July 14, 15, 1958 on motion for disqualification be furnished to counsel for petitioner as an indigent person

for use in further proceedings at the expense of the U.S. under 28 USC 753(f). [7/22/58]

Motion for Appointment of Counsel filed by Relator, together with Notice of Motion thereon. [9/4/58]

477 Transcript of testimony Monday, July 14, 15, 1958 filed. Gerald Gale, Court Reporter, Superior Court, New Haven, Conn. [9/11/58]

Continued arguments as to what additional evidence is to be included in the record and the effect of the Supreme Court opinion in denying certiorari. Oral arguments by Mr. Ullman and Mr. Pollak. Respondents exhibits AA, AB and AC for identification, filed as full exhibits, Respondent's exhibit X filed. Decision reserved. Smith, J. [9/26/58]

Memorandum of Decision on Remand, entered. Smith, J. Writ may be discharged, petition dismissed and relator remanded to custody of respondent. Copies mailed counsel. [10/14/58]

Certificate of Probable Cause entered. Smith, J. Copies mailed counsel. [10/14/58]

Motion to Make an Additional Finding and Notice of Motion filed by Relator. [10/23/58]

Motion to Appeal in Forma Pauperis and Notice of Motion filed. [11/5/58]

Hearing on (1) Motion to Appeal in Forma Pauperis. Motion granted. (2) Motion to make an additional finding. Decision reserved. [11/10/58]

Memorandum of Decision on Motion for Additional Finding entered. Smith, J. Copies mailed counsel (Louis H. Pollak, Jacob D. Zeldes, c/o Goldstein & Peck, Abraham Ullman, State's Atty., New Haven). [11/12/58]

Notice of Appeal filed by Relator. Copy sent to Abraham S. Ullman. [11/13/58]

Record on Appeal forwarded Clerk, U.S. Court of Appeals, Foley Square, N.Y., N.Y. Copies of Index forwarded counsel of record. [12/15/58]

478 In United States Court of Appeals for the Second Circuit

No. 261—October Term, 1958

Argued April 13, 1959.

Docket No. 25465

U.S. EX REL. HAROLD D. ROGERS, Relator-Appellant

v.

MARK S. RICHMOND, Respondent-Appellee

Before: CLARK, Chief Judge, SWAN and MOORE, Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, J. Joseph Smith, Judge, which dismissed a writ of habeas corpus and remanded relator to the custody of respondent, Warden of Connecticut State Prison. Affirmed.

LOUIS H. POLLAK of New Haven Conn., and JACOB D. ZELDES of Bridgeport, Conn., Attorneys for Appellant.

479 ABRAHAM S. ULLMAN, State's Attorney, Arthur T. Gorman, Assistant State's Attorney, and Robert C. Zampano, of New Haven, Conn., Attorneys for Respondent.

OPINION—OCTOBER 28, 1959

MOORE, Circuit Judge:

In May of 1954 the relator was convicted in a state court in Connecticut of murder committed during the

perpetration of a robbery. He was sentenced to death. In his trial two confessions by him were put in evidence over objection that they were induced by coercion. The trial judge after hearing evidence in the absence of the jury found the confessions voluntary and admissible.[1] The conviction was affirmed by the Supreme Court of Errors, one judge dissenting. State v. Rogers, 143 Conn. 167, 120 A. 2d 409, cert. den. 351 U.S. 952. Thereafter a federal writ of habeas corpus was issued by Judge Smith. Without having before him the entire record of the state court proceedings, Judge Smith took testimony and made independent findings of fact. He found the first confession to have been coerced in violation of the due process clause of the Fourteenth Amendment, and ordered the judgment of conviction vacated. Judge Smith's opinion is reported in 154 F. Supp. 663, sub nom. U.S. ex rel. Rogers v. Cummings. On appeal this order was reversed and the cause was remanded with directions to Judge Smith to examine the entire state trial record. United States v. Richmond, 480 252 F. 2d 807, cert. den. 357 U.S. 220. The opinion of this court at page 811 stated:

> We conclude therefore, that on remand the judge below should take such steps as will assure him that he has in evidence not only the findings of the trial court as to the admissibility of the confessions but also the transcript

[1] In Connecticut the facts relating to the charge of coercion in obtaining a confession are developed before the judge. Upon these historical facts, he passes upon the admissibility. If found to be voluntary, the confession is admitted. In contrast, in New York and certain other states, the question of coercion is submitted to the jury with all the other facts and a general verdict found. Hence, decisions such as Spano v. New York, 360 U.S. 315 (1959) are not applicable.

> of the preliminary hearing on which the trial findings were based. Unless the judge below shall find in the record thus before him material which he deems to constitute "vital flaws" and "unusual circumstances" within the meaning of Brown v. Allen, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the State trial court. Brown v. Allen, 344 U.S. at pages 507–508; 73 S. Ct. at page 446.

In denying certiorari the Supreme Court wrote a Per Curiam opinion which reads as follows:

> The petition for writ of certiorari is denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See Brown v. Allen, 344 U.S. 443, 506, et seq.

After remand Judge Smith received in evidence the entire transcript of the state court proceedings. Included in the findings of the state trial court was the specific finding that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney."[2]

481 In the original federal hearing, which resulted in the order vacating the conviction, Judge Smith found that Rogers had asked to see his lawyer during the period of questioning that led to the first

[2] On the day of the questioning Rogers was in jail awaiting trial on another charge unrelated to the indictment for murder subsequently filed against him. He had retained counsel on the unrelated charge.

confession, and he relied heavily upon this finding in holding that the confession was illegally coerced. In so finding, Judge Smith as a matter of credibility accepted the testimony of Rogers rather than that of other witnesses.

In his opinion after remand, not officially reported, Judge Smith proceeded to make his decision in accordance with the Supreme Court's interpretation as is evidenced by his statement that "this 'interpretation' by the Supreme Court, on its face, seems to mean that the District Judge, after examining the record of the state proceedings, is free to accept the state factual determinations in those proceedings and base his constitutional determination thereon, or to reject them and call for testimony on which to base his constitutional determinations * * *" He recognized that the opinion (Mr. Justice Frankfurter, Brown v. Allen, supra, p. 506) "emphasizing the possibility that the facts have been tried and adjudicated against the applicant, and implying that their determination may well be accepted in the absence of a vital flaw in their state court determination points to a standard to be followed" and that "something must appear upon examination of the state court record to require a trial de novo of the fact issues." Furthermore, he was well aware that the Supreme Court in its comment denying certiorari "makes it plain that there may be circumstances in which the judge may, after review of the state court record, decide to take testimony and not be bound by the state court findings, even though no vital flaw is necessarily found."

Judge Smith's own understanding of the broad scope of his power and review upon the remand is vital to a proper determination of this appeal.
482 He did not regard himself as foreclosed from exercising his independent judgment or as in

the role of a rubber stamp upon state court conclusions. To him "the question here is whether on review of the full trial court record [which he had not had before him when he delivered his previous opinion], testimony should be considered in a trial de novo." He knew that he was privileged to "take additional testimony not considered by the state trial court on constitutional issues, such as lack of due process by the use of coerced confessions, and make an independent determination of the facts, such as the voluntary character of confessions, and [that he] must independently determine whether the conviction may constitutionally stand" but that he might "not substitute his judgment on factual issues fairly tried (i.e., where no vital flaw exists) before a state court on similar evidence." With this appreciation of his powers and his duties and "considering the full state trial record anew, to determine whether other evidence should be considered," Judge Smith concluded that the writ should be discharged. In so doing, he ignored "the impressions" made on the trial before him prior to his consideration of the full state record and his own opinion that "on similar evidence, if properly before it, this court [he] would reach the opposite finding." The correctness of Judge Smith's holding that "Subsequent disagreement with his [the state trial court] weighing of essentially similar evidence is not in itself sufficient under the limitations now imposed in the interest of proper balance in our dual court system, to permit consideration of the matter heard at the trial of the issue de novo here" is the major question for decision upon this appeal.

However, if by "limitations" the question is raised as to the right of a federal judge or a federal appellate court to take an appellate record after conviction

in a state court and appellate review and years after the trial upon the printed record substitute its
483 own opinions as to credibility of witnesses (not seen), weight to be accorded to their testimony and inferences to be drawn therefrom (in other words, to make a redetermination of the historical facts), a much broader and more serious problem is presented. Is a convicted state prisoner, having been unsuccessful before a jury of his peers or a judge, to be able via habeas corpus to have his case re-tried by some federal judge in the district of his incarceration and, if so, is the federal judge to have the right to re-determine the historical facts? Such expressions as "relevant historical facts," "unusual circumstances" and "vital flaws" are not too helpful. They are not self-defining and do not lend themselves to objective use. The closeness of the fact question does not require that it remain unresolved but it does increase the likelihood that the minds of judges and jurors will differ widely in its proper resolution. Under our system of law, juries, and in certain cases judges, are charged with this responsibility. Where does it (or, better, should it) ultimately rest? Take a single case. It is tried and appealed twice in a state court, certiorari is denied. Three, four or ten years later, a federal judge or appellate court takes a different view and decides to believe witness A instead of witnesses B and C as to coercion. Would it not have been better to have had the case tried originally before a federal judge so that the time and expense of the state proceedings could have been avoided? To be sure, the Congress had not yet adopted a statute reading, in effect, that a case involving a closely disputed question of fact as to the coercion of a confession shall not be tried and decided in a state court but no statute will be necessary if the courts by deci-

sion create the same result. Or as a short cut a federal judge might be called into the state court trial for the purpose of deciding the question then and there with the case held open pending an appellate court's views on the facts. Would not such a procedure free the problems more fairly than to
484 indulge, in words, in solicitude for the preservation of the "delicate balance of federal-state relationships" and the avoidance of "serious federal-state tensions," yet at the same time, in decisions, to destroy any vestige of state autonomy.

Brown v. Allen, specifically referred to by the Supreme Court in its opinion as to Judge Smith's powers clearly supports the procedure adopted by him and the result reached. Both opinions in Brown v. Allen (Mr. Justice Reed and Mr. Justice Frankfurter) stress the difference between resolution of the factual issues and the determination of constitutional issues. Frequently, expressed and implied therein is the thought that first the federal judge must ascertain the basic facts which may be in the state record. If they are not in the record, they may be supplemented by a hearing. These are the "historical facts, the external events that occurred." It is upon these facts that the federal judge is to decide whether the state court "may have misconceived a federal constitutional right." This thought was expressly covered by way of illustration in the opinion of Mr. Justice Frankfurter, wherein he said (referring to a fact situation most analogous to this case):

> Moreover, the kinds of State adjudications differ. In some cases the State court has held a hearing and rendered a decision based on specific findings of fact; there may have been review by a higher State court which had be-

fore it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases (Brown v. Allen, p. 504).

This is the type of hearing and review given by the state court here. The entire emphasis in Brown v. Allen is upon a "denial of constitutional rights" based upon "the uncontradicted evidentiary facts" 485 rather than on a retrial to redetermine credibility. This is the indicated area of federal review.

A reading of the alleged coerced confession cases in the Supreme Court over the last few years confirms this view. Thus, in the opinion of the court (Mr. Justice Frankfurter) in Watts v. Indiana, 338 U.S. 49, 50–51 (1949), the rule was stated: "On review here of State convictions, all those matters which are usually determined issues of fact are for conclusive determination by the State Courts and are not open for restrictions by this Court. Observance of this restriction in our review of State Courts calls for the utmost scruple." In Gallegos v. Nebraska, 342 U.S. 55 (1951), "neither Judge nor jury accepted the testimony of Gallegos on disputed facts as to coercion" (p. 60). The Supreme Court, although recognizing that it was the responsibility of the Federal courts to make the ultimate determination as to the voluntary character of the confession, nevertheless said that because of the better opportunity afforded State agencies to appraise the weight of the evidence and to see the witnesses personally, this cason "leads us to accept their judgment insofar as facts upon which conclusions must be reached are in dispute" (p. 61). The court continued: "We [the court] give deference to the [State's] conclusions on

disputed and essential issues of what actually happened" (p. 61).

Even as in Gallegos, here "The issue of Federal due process now tendered is to be considered only on uncontroverted facts" (p. 62). Here Rogers, again even as Gallegos, testified to harsh treatment, but this testimony was seriously disputed and resolved by the court and jury, respectively, against them. The function of the Federal court in protecting a defendant against violation of his constitutional rights does not extend to passing upon issues of credibility or
486 to picking and choosing from amongst the various witnesses whose testimony the court may choose to accept or reject.

In passing upon the constitutional issues, the court turns "to the undisputed portions of the record to ascertain the facts against which petitioner's claim of coercion must be measured" (Thomas v. Arizona, 356 U.S. 390, 393 (1958)). This principle was restated with even greater clarity in the same case, the court saying, "Whatever the merits of this dispute, our inquiry clearly is limited to a study of the undisputed portions of the record. '[T]here has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved [against petitioner] by the State's adjudication.' Watts v. Indiana, 338 U.S. 49, 51-52 (1949). Time and again we have refused to consider disputed facts when determining the issue of coercion."

In this court, Chief Judge Clark cautioned against the "overturn by any Federal Judge of the reasoned conclusions reached by a whole hierarchy of state tribunals." United States v. Murphy, 2 Cir., 1955, 222 F. 2d 698, 706. And, more recently, in United

States v. Jackson, 2 Cir., 1958, 256 F. 2d 7, this Court said that it would review and come to its own independent conclusion "If the undisputed facts disclose that a defendant's confession was involuntary, and it appears that without this evidence he would not have been convicted" (p. 9).

The trial judge's finding that Rogers had not asked to see a lawyer turned on a refusal to credit Rogers' testimony. Capt. Eagan, Assistant Chief of the New Haven Police, testified that Rogers did not ask him for permission to call counsel and that so far as he knew Rogers did not ask anyone else for permission to do so. At the hearing before Judge Smith, Rogers testified but Capt. Eagan did not. However, three detectives of the police force, who had
487 participated in the questioning of Rogers but had not testified at the state trial, testified at the federal hearing that Rogers had not asked to see a lawyer. Judge Smith chose to credit Rogers' testimony. In his opinion on remand he explained that he had done so because it seemed probable that Rogers would ask to see the lawyer who was already representing him on the other charge, and because the recollection of the police officers after so long a period of time would be likely to coincide with what they subconsciously would prefer. Hence, it appears that Judge Smith and the state trial judge reached opposite conclusions on the factual issue whether Rogers asked to see his counsel solely because each reached a different conclusion as to Rogers' credibility. We see no valid reason for substituting the intuitive inferences of an able and conscientious federal judge on the issue of credibility for those of an able and conscientious state trial judge, where the evidence before each was essentially similar as Judge Smith said it was.

However, in a habeas corpus proceeding the federal district judge must make his own determination as to the legal significance of historical facts and the application of constitutional principles to the facts as found. In the words of Mr. Justice Frankfurter in Brown v. Allen, page 507: "For instance, the question whether established primary facts underlying a confession prove that the confession was coerced or voluntary cannot rest on the State decision." Hence, accepting the historical fact that Rogers had not asked to see counsel during the period of questioning, determination whether his constitutional rights were violated by use of the confession in his trial remained to be made by Judge Smith. He
488 concluded that they were not violated. A majority of this court agrees.

As Brown v. Allen points out, at page 510, in habeas corpus petitions the Congress has designated the district court to be the instrument of the application of the superior authority of the federal law. Congress might have designated another member of "the hierarchy of the federal judiciary" to express that law but it chose the district court rather than the court of appeals or the Supreme Court. Therefore the district court's review on habeas corpus of a state conviction is not, "a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than state law." But since the application of federal law to state convic-

[1] In Lisenba v. California, 314 U.S. 219 at 236, the court said: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. * * * Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt."

tions has been assured by the district court's review, our review of the district court's judgment becomes the ordinary appellate review wherein a higher court sits in judgment of a lower court's determination. Accordingly, we ought to apply the normal "clearly erroneous" standard of review. Wade v. Mayo, 334 U.S. 672 (1948); Palakiko v. Harper, 209 F. 2d 75, 83 (9 Cir., 1953); Albert ex rel. Buice v. Patterson, 155 F. 2d 429, 433 (1 Cir., 1946), seem clearly to dictate such a conclusion. See also Cranor v. Gonzales, 226 F. 2d 83, 94 (9 Cir., 1955).

The facts concerning the making of the confessions are set out in detail in an Appendix to this opinion, which reproduces pages 314–320 of appellant's Appendix A. We need not restate them.

The fact that Rogers was taken from jail to the State's Attorney's office without a court order could not have affected the voluntariness of his confession since he was unaware of it. Finding 106.

The manner in which he was questioned does not appear to have been abusive nor so prolonged
489 as to warrant the conclusion that his first confession was coerced.[1] It should be emphasized that Rogers was not an indicted defendant but a suspect who was being questioned in the course of investigating an unsolved crime, a distinction often recognized by the Supreme Court.[2] Moreover, Rogers was no novice in respect to contact with the police. His brother was a police officer. At the time of the questioning Rogers was under arrest on a charge of robbery and had previously been under arrest on three other occasions. He was 46 years of age and

[1] Cf. Spano v. New York, 360 U.S. 315.

[2] Crooker v. California, 357 U.S. 433; Cicenia v. Lagay, 357 U.S. 504; In re Groban's Petition, 352 U.S. 330.

the state trial court found him "highly intelligent," although his formal education was only through the eighth grade.[6] A man of his age, intelligence and experience is not likely to be frightened into confessing to murder by questioning in the manner here employed.[7]

Rogers claimed at the trial that he confessed because he did not want his wife brought in for questioning when she was practically crippled with arthritis. Assuming she was crippled, although no proof of it was offered at the trial, there is no evidence that Capt. Eagan was aware of her condition. The only objection made to him when he threatened to bring the wife in for questioning was that she didn't know anything about the murder. She was a legitimate subject of police inquiry. In the absence of evidence that the police knew of Mrs. Rogers' arthritic condition and sought to take advantage of it to pressure Rogers into a confession, his decision to shield his wife from questioning does not, in our opinion, render his confession involuntary
490 within the meaning of the due process clause of the Fourteenth Amendment.

We have concluded that the police questioning of Rogers did not render his first confession involuntary. We also hold that Rogers' second confession was not a product of coercion. This second confession was made to the coroner some 16 or 17 hours after the police questioning that led to the first confession had ceased and after the coroner had informed Rogers of his right to remain silent and of his right to counsel.

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[6] See Stein v. New York, 346 U.S. 156, 185–186.

[7] See Stein v. New York, supra, 184; Voght v. United States, 5 Cir., 156 F. 2d 308, 312; Hawkins v. United States, D.C. Cir., 158 F. 2d 652, 653–654, cert. den. 331 U.S. 830.

The court expresses gratitude to assigned counsel for their very competent services in representing the appellant.

For the reasons above stated the judgment discharging the writ is affirmed.

APPENDIX

Below are set forth pages 314-320 of Appellant's Appendix A.

SIXTH

Hearing on Admissibility of Exhibit VV

The State through Assistant Chief of Police Raymond Eagan sought to offer in evidence the statement made by the accused on the night of January 30, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.

On the evidence adduced on this issue the following facts were proven:

71. On Saturday, November 21, 1953, the body of Mrs. Dorothy Kennedy was found in the West Shore Package Store under circumstances indicating
491 that she had died from bullet wounds during the course of a robbery committed by a person unknown.

72. Thereafter investigations into this crime were conducted by the West Haven Police and other prosecuting authorities to no avail.

73. On the evening of January 9, 1954, the New Haven Police arrested the accused on charges of crime committed that day at the Travelers Hotel in New Haven.

74. At the time of his arrest the accused had in his possession a loaded 38 calibre Smith & Wesson revolver.

75. The accused was questioned by police that evening and claimed he had won the gun in a "crap game" that day.

76. On being questioned further on the following day the accused admitted having stolen the gun from the home of his nephew George Evans.

77. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.

78. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.

79. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.

80. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascer-
492 tained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

81. Thereupon a letter from the State's Attorney's Office was delivered to the Jailer requesting him to permit police officers to take the accused to the State's Attorney's Office for questioning.

82. In compliance with this request, the accused was presented at the State's Attorney's Office shortly after noon.

83. During his first hour at the State's Attorney's Office the accused was not questioned at all.

84. Thereafter on questioning by the officers he denied knowledge of or implication in the murder of Mrs. Kennedy.

85. During this questioning and at all times while at the State's Attorney's Office the accused was seated in an armchair, his handcuffs released so that the cuffs were attached to only one wrist and his hands and arms free.

86. The accused was permitted to smoke cigarettes and did smoke during the afternoon and evening, some of the cigarettes being furnished by police officers in attendance.

87. At about 4 o'clock in the afternoon he was given a sandwich and coffee which he consumed.

88. In response to a telephone call Assistant Police Chief Eagan arrived at the State's Attorney's Office about 8 p.m. and thereupon proceeded to question the accused further.

89. The accused persisted in his denials and during the course of the questioning Chief Eagan informed the accused he was intending to send for the accused's wife in order to question her as to any knowledge she might have of the affair.

493 90. Chief Eagan then pretended to put through a telephone call to Police Headquarters stating, in the hearing of the accused, that he would call the officers later with respect to sending for Mrs. Rogers.

91. During the hour following this fictitious call Chief Eagan questioned the accused further and also asked him if he wanted anything to eat and the accused requested coffee.

92. Chief Eagan then indicated he was ready to call the officers again to instruct them to bring Mrs. Rogers to the State's Attorney's Office whereupon the accused announced his readiness to make a statement.

93. After a few brief admissions by the accused, one of the Official Court Reporters was summoned and a stenographic record was made of the statements made by the accused in response to questions by Chief Eagan, which statement is Exhibit VV.

94. At the conclusion of the statement the accused signed the stenographic notes.

95. Although the statement started about 10:40 p.m. and ended about midnight there were interruptions for coffee, cigarettes and short recesses.

96. At no time was the accused subjected to continuous or extended questioning.

97. No force, threats or inducements were made or offered to the accused at any time.

98. The accused acknowledged at the trial that he was not abused and made no complaint at any time of his treatment by the police.

99. The treatment of the accused by the investigators was at all times considerate.

494 100. The accused had experienced previous arrests and interrogations by the police and the treatment accorded him on this occasion did not adversely affect him.

101. The accused did not at any time on the day of the questioning request the presence or assistance of an attorney.

102. The accused answered the questions put to him directly and unhesitatingly.

103. The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth.

104. Neither at the trial or in his Claims of Proof on this Appeal did the accused make any claim that his statement admitting the shooting of Mrs. Kennedy was untrue.

105. The delivery of the accused to the State's Attorney's Office and his presence there on January 30th were not unlawful.

106. If there was any element of irregularity or illegality in his presence at the State's Attorney's Office on that date, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession.

107. The statement made by the accused to the police on this date was freely and voluntarily made and accordingly was admissible in evidence.

SEVENTH

Hearing on Admissibility of Exhibit WW

The State through Coroner James J. Corrigan sought to offer in evidence a statement made by the accused at the Inquest conducted by the Coroner on January 31, 1954, whereupon the Court in the
495 absence of the Jury conducted a hearing on the admissibility of such evidence.

On the evidence adduced on this issue, the following facts were proven:

108. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.

109. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.

110. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the

New Haven County Jail on the mittimus issued by the Clerk of that Court.

111. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

112. During the morning of January 31, 1954, James J. Corrigan, Coroner for New Haven County, was informed that the accused had on the preceding evening confessed to the police his murder of Mrs. Kennedy, and the Coroner thereupon instructed that he was issuing a warrant to hold the accused incommunicado at the County Jail.

113. During that morning Coroner Corrigan was for several hours engaged in the investigation of a gas explosion that caused several deaths that day.

496 114. About noon on that day Attorney Chester T. Corse, an office associate of Attorney Robinson, asked the Sheriff for permission to see the accused and was informed by the Sheriff that the accused was being held incommunicado on the Coroner's order.

115. Shortly afterwards, the Coroner's warrant was delivered to the Sheriff at the Jail directing him to hold the accused at the County Jail pending further orders from the Coroner.

116. In the later afternoon of that day the Coroner telephoned the Sheriff and asked that the accused be brought to the Coroner's Office for questioning.

117. Thereupon the Sheriff delivered the accused to the Coroner's Office and the Coroner administered to the accused the usual oath.

118. Before proceeding to interrogate the accused, the Coroner cautioned him as to his constitutional

rights, informing him that he was under no duty to answer questions and that he had the right to refuse to give testimony and that any testimony he might give might be used against him.

119. The accused was further told by the Coroner that he had the right to be represented by counsel if he wished.

120. The accused after hearing the cautionary remarks of the Coroner, stated that he understood his rights and averred his willingness to testify.

121. No threats of harm or promises of reward were made by the Coroner to the accused.

122. The accused understood the language used by the Coroner and the rights afforded to him under the Constitution of the United States and the laws of this State.

123. The accused is highly intelligent and fully comprehended the statements made to him by the Coroner.

497 124. The accused was the brother of a police officer and had experienced previous arrests and interrogations by the Police.

125. The accused did not ask to be represented by counsel.

126. The accused voluntarily chose to testify after hearing from the Coroner that he was entitled to counsel and that anything he said might be used against him.

127. The accused answered the questions calmly and voluntarily.

128. The questioning by the Coroner lasted about an hour and one-half and thereupon the accused was returned by the Sheriff to the County Jail and his incommunicado status was released the following day.

129. The delivery of the accused to the Coroner

Office and his presence there for questioning were not unlawful.

130. If there was any element of irregularity or illegality in his presence at the Coroner's Office on that day, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession to the Coroner.

131. The statement made by the accused to the Coroner was substantially the same as that made by him the previous evening to the Police.

132. The statement of the accused was freely and voluntarily made and accordingly was admissible in evidence.

498 CLARK, Chief Judge (dissenting):

No federal judge can contemplate with pleasure or even equanimity the obligation, now imposed upon him by constitutional principles defined by our highest court, of examining anew the fairness of confessions received in state capital cases and accepted by the state courts. But there is no question of our duty and responsibility in the premises, and if we are not to make of this a meaningless and illusory gesture we must bring to it all the powers of independent thought and analysis of which we are capable. Since here I find my own conclusions at variance with the views of a number of judges, state and federal, whom I highly respect, the task is indeed disagreeable. Some solace is discoverable, however, in the fact that two unusually restrained judges, Justice (later Chief Justice) O'Sullivan in the state court and Judge Smith in the federal court, have reached conclusions substantially similar to my own. I am led by this circumstance, coupled with the additional facts that the police methods in obtaining the accused's confessions were harsh and deceitful and the confessions

themselves concededly a tissue of lies in their assertion of prior intimacies with the victim, to believe that the State itself here cannot and will not ultimately allow this defendant to be put to death until he has had a fairer trial. We cannot, however, anticipate action by the State's Chief Executive and must reach our own conclusion on this issue when presented on federal habeas corpus.

The court below and my brethren accept as crucial the question whether the federal trial court may make its own findings or is bound by the state court findings on important details such as, notably, whether relator asked during his interrogation to see his counsel. The question is obviously important, as everyone seems to concede that if the request was made and refused the confessions cannot be
499 received. Hence I shall discuss it below.

But I cannot believe it is final in the sense that rejection of Judge Smith's finding of such a refusal will necessarily authenticate the confessions. For it seems to me that on the admitted and incontrovertible facts these confessions cannot be considered "voluntary" in any real meaning of the word—indeed, that however they may be characterized, that adjective is singularly inappropriate. I suggest that the confessions would necessarily be inadmissible under English and under federal law. The lack of any proper admonitory caution by the police would be sufficient to vitiate them under the former, see Mr. Justice Devlin, The Criminal Prosecution in England 31–41; 137, 138 (1958); and that and other factors, including the lack of prompt arraignment with its resultant safeguards, would compel a like result under federal law. See discussion in United States v. Cleary, 2 Cir., 265

F. 2d 459, 462, 463. Hence our real issue is whether a less rigorous standard is to be accepted as state due process of law. Spano v. New York, 360 U.S. 315, and cases cited at 321.

Consider the facts, i.e., the "external" acts or events which are common ground here. I think the most complete, as well as judicious and succinct, statement (showing the admitted as well as disputed facts) is that of Judge Smith in his first opinion, D.C. Conn., 154 F. Supp. 663, 664–665, and I incorporate it here by reference. These facts are shortly summarized in his opinion on remand: "Yet, there was the illegal removal from the jail to the office for interrogation, the illegal holding incommunicado, denial of access to his lawyer, questioning by different officers for some eight hours intermittently in relays, the faked phone calls about his wife and children, finally succeeding by inducing Rogers to abandon his denials and make the confession, repeated the next day before the coroner." D.C. Conn., — F. Supp. —, —.

500 Note that whether or not relatro made the request to see his counsel, it is clear that the police took no steps to remind him of his right to counsel or put him in touch with his lawyer, although they knew he had a lawyer and who the lawyer was. It is also admitted that the next day when relator was before the coroner his lawyer was specifically refused access to him. The pattern is clear, too, of a steady grilling while he was handcuffed to a chair; and when he did not break down, Chief Egan was called in, who employed the ruse of pretending to send for his crippled wife, with the final compulsory admonition that he would be "less than half a man" if he forced them to take his wife and children into

custody.[1] Surely by then he had to realize that he had only a dim future unless he confessed.

My brothers attach such importance to the detailed and numbered findings of the state trial court that they reproduce this material in their appendix. Now the basic facts there recited, without the embellishments added, do show the far from voluntary character of the confessions. But in thus lending emphasis to these elaborations upon the underlying facts, I think my brothers have overlooked the unique character of findings of fact in Connecticut appellate practice; for there they serve only as steps in appeal, and not as aids to the adjudication itself. So on all appeals, civil and criminal, and in jury as well as court cases, findings are made after the judgment, but only on request of the appellant and with both sides submitting drafts thereof. Conn. Prac. Bk. 1951, §§ 385–400, 406, 410, and Forms 558–563; Maltbie, Appellate Procedure in the Supreme Court of Errors of Connecticut 129 (2d Ed. 1957). In practice the judge tends quite naturally to accept the version presented by the party for whom he has decided. So here the findings were filed five months after the decision and trial and were those presented by the State. Hence they include what are quite obviously argumentative conclusions or deductions which are not facts in any true sense, but do properly

[1] My brothers say that there was no proof at trial that she was crippled, and then assume that Captain Egan did not know of it so as to accept the conclusion that the ruse did not render involuntary the confession then obtained. But there are several answers to this. There was evidence at the trial below as to her condition, and Egan's actions do not make sense unless he knew what it was. And since this question turns upon relator's, and not Egan's, state of mind, I cannot see how the issue of specific knowledge by Egan can have the critical importance it has assumed.

represent the State's claims as to the ultimate judgment to be rendered. An example is No. 103: "The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth." Certainly no judge can know this as a fact; he can only deduce it as a conclusion and one (I submit) with no obvious support in the record.

Particularly to be noted in this connection are the mutually inconsistent or alternative claims of Nos. 105 and 106; and the first asserts that the delivery of Rogers to the State's Attorney's Office and his presence there on January 30 were not unlawful, while the second states that if there were illegality in that regard the accused was not aware of it, and it had no effect upon his confession. My brothers make much of this for reasons which are not clear to me. We are called upon to decide whether the admitted compulsion placed upon the accused transcended the bounds of due process. It would seem that the legality of his immediate detention would be a factor of some importance in making this test, while his knowledge or lack thereof of this one detail of illegality would be unimportant in the over-all picture of compulsion. U.S. ex rel. Wade v. Jackson, 2 Cir., 256 F. 2d 7, 13, certiorari denied Jackson v. U.S. ex rel. Wade, 357 U.S. 908; Turner v. Pennsylvania, 338 U.S. 62, 64, 66, 67.

502 And now I turn to the issue raised by Judge Smith's original finding (reiterated on remand if he was free to make it) that Rogers at his original interrogation asked to see his attorney and was refused this privilege. That finding had solid support of record in Rogers' very explicit testimony and in the natural probabilities. If he had the actual experience and knowledge of criminal prosecutions stressed

by my brothers, it seems simply incredible that he did not call for his already retained counsel as soon as he found himself suddenly being charged with murder and grilled on the assumption that he was guilty. Only the most abject fear could have restrained him. At the state trial only Captain Egan testified in denial of any request, and his testimony could not cover the crucial time of Rogers' earliest interrogation.[2] It is true that on the federal trial other police officers testified, some two and one-half years after the questioning, that their recollection was that he had not made such a request. As Judge Smith observed on remand: "It is quite natural for their recollection after so long a period to coincide with the version they must subconsciously prefer." D.C. Conn., — F. Supp. —, —: Thus Judge Smith's original finding, which he shows he would have reiterated had he felt free to do so, was and is quite soundly based and cannot properly be discounted on this appeal.

In their opinion my brothers hold that Judge Smith on remand, being more fully informed, was persuaded that he had been in error as to this fact and the
503 state judge had been correct.[3] This hardly does justice to the qualms as to his power which Judge Smith showed and his own clearly disclosed

[2] Thus on such a record Judge Smith's finding is amply justified, and the restrictions we have placed in our two appeals on his power to find facts far exceed those recognized by an appellate court passing the facts in review. It is to be noted that on this record the Supreme Court of Errors of Connecticut assumed on appeal that Rogers asked for counsel and Justice O'Sullivan, dissenting, stated flatly: "He immediately asked to see his lawyer." State of Connecticut v. Rogers, 143 Conn. 167, 120 A. 2d 409, 412, 415.

[3] The reiterated statement that Judge Smith's first opinion was rendered without the benefit of the full state record, while

reactions to the impact of the evidence before him. Perhaps the best evidence here is Judge Smith's own recital in his later opinion, D.C. Conn., — F. Supp. —, —, and I refer to it as support for my conclusion. For he reiterates that "Whether we call it a vital flaw or unusual circumstance, or a substantial ground for exercise of judicial discretion in granting a hearing, something must appear upon examination of the state court record to require a trial de novo of the fact issues. * * * Unless, on consideration of the full record such grounds are found, this court must accept the findings of historical fact in reaching its determination on the constitutional issues. This court is bound by the findings of the state trial court that no request for counsel was made, and that the confessions were voluntary, unless some vital flaw or unusual circumstance exists or some other basis appears for consideration of testimony outside the record." And I have quoted above the conclusions of fact he would have made but for "the limitations now imposed."

Though my brothers rather make light of it, it is clear that the Supreme Court's actual denigration of our previous decision, while failing to reverse it outright, Rogers v. Richmond, 357

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literally true, gives an emphasis to that factor which is rather misleading. Actually it now appears that the judge, who had accepted all of the state transcript offered by either party, had before him in the original trial all of the testimony relating to the voluntariness of the confessions given in the state trial court in the absence of the jury, except that of two witnesses in no way bearing upon the issue of relator's request for his counsel: the testimony of the deputy jailer as to the circumstances under which relator was removed from the jail to the State's Attorney's Office for questioning and the testimony of the sheriff as to keeping relator incommunicado from his counsel the next day on the coroner's orders. The only matters added later bearing at all upon disputed issues are the belated findings reproduced in my brother's appendix which I've criticized in the text above.

U.S. 220, did create some problems of interpretation, as commentators were quick to discover. 58 Col. L. Rev. 895; 72 Harv. L. Rev. 77, 93; 68 Yale L. J. 98. Naturally Judge Smith faced somewhat of a dilemma in having two appellate masters to serve, while he did have to act in the light of the fact that his earlier decision stood reversed. I am quite clear, however, that he was too modest and that under the Supreme Court ruling he was both entitled and bound to act normally as a judge and thus to credit his own natural and sincere judicial conclusions.'

Indeed, my brothers do not in terms disavow this interpretation, but their ambivalent attitude toward this issue now so crucial in American criminal procedure comes to that result in substance. They imply that the federal trial judge has a considerable reservoir of power (here untapped); but eventually they accept and approve the limitations on his power which are here shown to be completely stultifying. If a "vital flaw" or "unusual circumstance" is (a) necessary to release a federal judge into action and (b) is not to be found where the state trial did not produce all the witnesses covering the entire crucial time period, but did show the elements of coercion noted above, such as the handcuffing to a chair, it would seem unlikely that the necessary elements will ever be found. Hence the federal constitutional review of coerced confessions as violative of due process will become quite, if not wholly, illusory.

'In my view the Supreme Court took the course it did to emphasize its view that the trial court should always take steps to have the state transcript available; while at the same time it admonished the judge to act judicially. This appears to be the significance of its reference: "See Brown v. Allen, 344 U.S. 443, 506, *et seq.*"

For in all these cases coming to the federal courts there has been some finding by the state trier of facts (whether court or jury) that the confessions
505 are voluntary. This is the issue upon which federal judges must pass in testing whether or not constitutional principles of due process of law have been observed. How can they do anything but rubber-stamp the state holding if they must accept the facts as found during the heat of the contested trial which in its entirety is now supposedly under sober and dispassionate review? I suggest that this case, like others, demonstrates that we cannot fairly appraise the totality of acts and events relied on to show compulsion if we are to regard some of them, very likely the most crucial, as untouchable premises in our examination. Such unrealistic compartmentalizing of the important facts has not been attempted before either by us or by the Supreme Court. The contrary practice where the tribunal has not hesitated to make its own revaluation of the basic facts is illustrated by such cases as Leyra v. Denno, 347 U.S. 556; Payne v. State of Arkansas, 356 U.S. 560; and Fikes v. State of Alabama, 352 U.S. 191, and by a considerable body of our own precedents. See, e.g., U.S. ex rel. Corbo v. La Vallee, 2 Cir., Sept. 29, 1959; U.S. ex rel. Sileo v. Martin, 2 Cir., 269 F.2d 586; U.S. ex rel. Wade v. Jackson, supra, 2 Cir., 256 F. 2d 7, 13, 14, certiorari denied Jackson v. U.S. ex rel. Wade, 357 U.S. 908; U.S. ex rel. Savini v. Jackson, 2 Cir., 250 F. 2d 349; U.S. ex rel. Alvarez v. Murphy, 2 Cir., 246 F. 2d 871, 265 F. 2d 497; U.S. ex rel. Caminito v. Murphy, 2 Cir., 222 F. 2d 698, certiorari denied Murphy v. U.S. ex rel. Caminito, 350 U.S. 896; and see also Cranor v. Gonzales, 9 Cir.,

226 F. 2d 83, certiorari denied 350 U.S. 935. It is also demonstrated by the many cases on our
506 weekly motion calendars where we remand denials of habeas corpus for full hearing and the taking of testimony below. It seems to me rather late in the day to attempt to reverse this settled practice and principle of law.

Of course we cannot be insensitive to the problems faced by the police in a case of this character. Here a most abhorrent crime had remained unsolved for over two months; and when the police obtained a most promising lead pointing to Rogers as the criminal, the temptation to "sew up the case" is naturally strong. But our ideals of criminal prosecution, based on the English common law and embedded in our constitutions, do not permit the solution of criminal cases by forced confessions from persons seized as suspects. The rule of law which we herald as model for free peoples around the world does not permit us to follow such easy course; nor does Connecticut itself wish to do so.[6] That is why I do not believe this case

[5] U.S. ex rel. Blank v. Jackson, 2 Cir., 263 F. 2d 185, is not opposed to, but in fact appropriately complements, this line of cases. It holds that where in coram nobis proceedings the state subsequent to the original trial has conducted a full hearing with testimony and has then made a controlling finding of a crucial fact, the convicted accused cannot require the federal court to retry this issue.

[6] The 1959 session of the Connecticut legislature passed a bill making statements and confessions of an accused person inadmissible as evidence unless he had been properly arraigned and informed of his right to counsel. While Governor Ribicoff vetoed the particular bill because he thought it lacked proper safeguards such as the Judicial Council was now studying, he supported the general idea of the legislation, saying that its purpose "was completely in accord with our concepts of basic justice and fairness, and I concur with it." New Haven Register, July 2, 1959, p. 1, col. 6.

is yet at an end. At any rate, I think Judge Smith's original decision, D.C. Conn., 154 F. Supp. 663, 665, setting aside the conviction, but giving the State an opportunity to arrange for a retrial if it so chooses, is the necessary and correct course for us.

507 In the United States Court of Appeals
for the Second Circuit

Present: Hon. CHARLES E. CLARK, Chief Judge,
Hon. THOMAS W. SWAN, Hon. LEONARD P. MOORE,
Circuit Judges.

UNITED STATES EX REL. HAROLD D. ROGERS, RELATOR-APPELLANT

v.

MARK S. RICHMOND, WARDEN CONNECTICUT STATES PRISON, RESPONDENT-APPELLEE

JUDGMENT—OCTOBER 28, 1959

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, *Clerk.*

508 [File endorsement omitted.]

509 [Clerk's Certificates to foregoing transcript omitted in printing.]

510 PLAINTIFF'S EXHIBIT A

State of Connecticut, New Haven County, ss. City of New Haven, 9th day of January A.D. 1954.

To the Honorable City Court of New Haven, holden within and for the City and Town of New Haven, in New Haven County, comes BERNARD P. KOPKIND, City Attorney of the City of New Haven, and on his oath of office complaint and information makes, that on the 9th day of January A.D. 1954, at said City and Town of New Haven HAROLD ROGERS the accused did commit violate

	Section
Attempt Robbery While Armed	8361
Breaking and Entering (D.S.)	8410
Theft—2 Cts.	8401
Carrying Revolver in MV. W/o permit	1615

Wherefore the said City Attorney prays process, that the said accused may be arrested, held to answer this complaint and be thereon dealt with according to law.

Dated at New Haven, the day and year aforesaid.

BERNARD P. KOPKIND, *City Attorney.*

State of Connecticut, New Haven County, ss. City of New Haven, 9th day of January A.D. 1954.

To the Sheriff of said County of New Haven, his Deputy, or either of the Constables of the Town of New Haven, within said County, and to any member of the Police Department of the City of New Haven—GREETING:

By Authority of the State of Connecticut, You are hereby commanded to arrest the body of the within named HAROLD ROGERS and him, her, them forthwith

have before the City Court of New Haven, holden within and for the City and Town of New Haven, in New Haven County, to answer to the charges against him, her, them in the foregoing complaint of BERNARD P. KOPKIND, City Attorney of the City of New Haven, in said County, and be dealt with thereon as the law directs.

Hereof fail not, but of this warrant, service and return make, according to law.

Dated at New Haven, the day and year last aforesaid.

BERNARD P. KOPKIND, *City Attorney.*

511 Continued for trial to: 1-13-54.

New Haven County, ss. City of New Haven, January 9th, A.D. 1954.

Then and there by virtue of the within complaint and warrant I, Officer L. RUGGIERO, Det., arrested the body of the within named, HAROLD ROGERS; age 46; Police Record No. 93-505; and read the same in his her hearing, and now have him her them here in Court, before the City Court of New Haven, holden within and for the City and Town of New Haven, in New Haven County, for examination.

L. RUGGIERO, *Det.*

JAN. 13, 1954—No. 288

STATE vs. HAROLD ROGERS, 708 ORCHARD STREET, NEW HAVEN, CONN.

Complaint and Information for (1) Attempt Robbery While Armed; (2) Breaking and Entering (D.S.); (3) Theft, 2 Cts.; (4) Carr. Revolver in M.V. W/o Per.

Attorney: T. Robinson

Guardian ad litem:

Count	Plea	Finding	Ordered to be imprisoned in New Haven County Jail and/or to pay fine of
1	N.G.	W.E.	B.O. Sup. Ct.
2	N.G.	W.E.	B.O. Sup. Ct.
3	N.G.	W.E.	B.O. Sup. Ct.
4	N.G.	W.E.	B.O. Sup. Ct.

To stand committed until judgment is satisfied.
COMMITTED.

Continuance bond $25,000.
Binding over bond $10,000.
By the court:

A. J. CIRCUOLO, *Asst. Clerk*

512 PLAINTIFF'S EXHIBIT B

NEW HAVEN COUNTY, ss., CITY OF NEW HAVEN

To the Sheriff of the County of New Haven, his Deputy, or either Constable or Policeman of the City of New Haven, in the said County, and to the Keeper of the Jail in said County—GREETING:

Whereas, HAROLD ROGERS, hereinafter termed the accused, was this day brought before the City Court of New Haven, holden within and for the City of New Haven, in New Haven County, by virtue of a warrant issued upon complaint of BERNARD P. KOPKIND, Assistant City Attorney, of the City of New Haven, for that, on January 13, 1954, in said City, with force and arms, the said accused did commit the crime of Attempted Robbery While Armed, Breaking and Entering, Theft—2 Cts., Carrying Revolver in M. V. no Permit; which will more fully appear from the com-

plaint on file; against the peace, of evil example, and contrary to the statute in such cases made and provided.

And having inquired into the facts, said Court did find that there were probable grounds to support said complaint, and thereupon it was considered and ordered the said accused become bound in a recognizance with sufficient surety, to the treasurer of the State of Connecticut, in the sum of 10,000.00 dollars, that the said accused appear before the Superior Court, to be holden at New Haven, within and for the County of New Haven, on the 1st Tuesday of April A.D. 1954, then and there to answer to said complaint, and abide the order or judgment of said Court touching said complaint, or the matters charged therein. And whereas the said accused hath refused, and now before said City Court refuses to comply with and perform said order, and give said recognizance, though a reasonable time has elapsed:

These are therefore, by authority of the State of Connecticut, to command you to take and convey the said accused to the common Jail in said City and County of New Haven, and said accused deliver to the keeper thereof, and leave with him this warrant: And you, the said keeper, are alike commanded to receive the said accused into your custody in said Jail, and said accused there safely to keep until said accused shall comply with said order, or be otherwise discharged by order of law.

Dated at the City of New Haven, January 13, 1954.

A. J. CIRCUOLO,
Assistant Clerk of said City Court.

513 JAN. 13, 1954.

MITTIMUS

Do not release. See other mittimus.

HAROLD ROGERS

Binding over to Superior Court April Term, 1954.

City Court of New Haven

State of Connecticut, County of New Haven, ss. New Haven, Jan. 13, 1954.

Then and there by virtue of said Mittimus, I took, conveyed and delivered the within named HAROLD ROGERS, into the custody of the Keeper of the Jail of said New Haven County, and on the same day I left this the original mittimus, with my doings thereon endorsed with said keeper of the jail at New Haven, Connecticut.

Attest: OFF J. SPARAES.

JAN. 30, 1954.

To the Keeper of the New Haven County Jail, then and there, I removed the within named, HAROLD ROGERS, from the New Haven County Jail.

EDMUND S. FLANEGAN,
County Detective.

514 PLAINTIFF'S EXHIBIT D

To the Sheriff of the County of New Haven, his Deputy, or any Police Officer of the City, Town or Borough of West Haven, in said County, or any Member of the Connecticut State Police Department, and to the Keeper of the Common Jail in the Town and County of New Haven—GREETING:

Whereas, I, the undersigned, James J. Corrigan, Coroner for the County of New Haven, have good reason to suspect and do suspect HAROLD D. ROGERS

of said Town of New Haven of having criminally caused the death of Dorothy Kennedy at said town of West Haven on the 21st day of November 1953, in regard to whose death said Coroner is holding an inquest and

Whereas, said Coroner has ordered and does hereby order that said HAROLD D. ROGERS be forthwith arrested and committed to the common jail aforesaid until the expiration of twenty-four hours from and after the finding of said Coroner in and upon said inquest or until he shall be otherwise released or discharged by order of said Coroner and in due course of law. Now these are therefore

By the authority of the State of Connecticut to command you forthwith to arrest the said HAROLD D. ROGERS and commit him to the keeper of the said jail and leave with the said keeper this warrant, and the said keeper of said jail is commanded to receive and keep safely and hold said HAROLD D. ROGERS within said jail until the expiration of said twenty-four hours from and after the finding of said Coroner in and upon said inquest, or until he shall be otherwise released or discharged by order of said Coroner and in due course of law.

Dated at New Haven this 31st day of January 1954.

JAMES J. CORRIGAN,
Coroner for New Haven County.

515 JAN. 31, 1954.

HAROLD ROGERS.

Do not release. See other mittimus.

Supreme Court of the United States

No. 552 Misc., October Term, 1959

HAROLD D. ROGERS, PETITIONER

vs.

MARK S. RICHMOND, WARDEN

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—FEBRUARY 23, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 721. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LE COPY In forma pauperis
Petition not printed

Office-Supreme Court, U.S.
FILED
FEB 8 1960
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM 1959

No. ~~552 Miscellaneous~~ #40

HAROLD D. ROGERS
Petitioner

vs.

MARK S. RICHMOND, WARDEN
Respondent

On Petition For a Writ of Certiorari To the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

ABRAHAM S. ULLMAN,
State's Attorney

ARTHUR T. GORMAN,
Assistant State's Attorney

ROBERT C. ZAMPANO,
Counsel for Respondent

County Court House
121 Elm Street
New Haven, Connecticut

Dated February 3, 1960

THE WHAPLES-BULLIS CO., NEW HAVEN, CONNECTICUT

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In the

Supreme Court of the United States

No. 552 Miscellaneous

HAROLD D. ROGERS
Petitioner

vs.

MARK S. RICHMOND, WARDEN
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The citations of the opinions of the lower courts are adequately set forth in the Petition and Appendix thereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Did The Court of Appeals err in holding that the powers of the District Court on Habeas Corpus should not be enlarged to permit the rejection of the historical facts as found by the state trier, in the absence of special circumstances?

2. Did The Court of Appeals err in holding that the facts and circumstances surrounding petitioner's confessions were not such as to render them involuntary, and inadmissible at his trial?

STATEMENT OF THE CASE

On the evening of November 21, 1953, Dorothy Kennedy was shot and killed by petitioner Harold Rogers in her husband's liquor store. Earlier that day petitioner, having decided to procure money by means of robbery, stole a revolver and cartridges from the home of his nephew. He loaded the gun, consumed some liquor and drove to decedent's store. On entering, he asked for a half-pint of liquor and thereupon produced his gun and announced his purpose to commit robbery. As decedent ran to the telephone, petitioner struck her on the head with the butt end of the gun. He then fired five shots at deceased, causing her immediate death. Petitioner then removed the contents of the cash register and drove off.

In the meantime Rogers' nephew, having discovered the loss of his gun sought out petitioner and charged him with taking the gun. Petitioner steadfastly denied stealing it whereupon both men went to police headquarters and reported that the gun had been stolen by persons unknown. Thereafter petitioner filed off the serial numbers of the gun to conceal its identity.

On January 9, 1954, petitioner was arrested on charges of Attempted Robbery, Breaking and Entering and Theft, committed that day at the Travelers Hotel. As the officers made the arrest, they observed Rogers hide a gun under the seat of his automobile. On being questioned he gave a signed statement to the police claiming that he had just won the gun in a "crap game" that afternoon, but in a statement the following day admitted stealing it from his nephew's home (A. 286).

On January 13, 1954, petitioner was presented in the City Court of New Haven on the Travelers Hotel charges and was bound

over to the April Session of the Superior Court and in default of bail was lodged in the County Jail.

On the morning of January 30, 1954, ballistics tests conducted by the State Police established that the bullets recovered from the Kennedy murder scene were fired by the gun found in petitioner's possession. Thereupon, at about 1 P. M. on the same day, petitioner was brought to the office of the State's Attorney for questioning. Detectives started to question him at about 2 P. M. (A. 195). At all times during the questioning Rogers was seated in a comfortable armchair (A. 42). During the afternoon he was invited to eat and did eat and have coffee with the detectives; and later in the evening he was again invited to eat but chose merely to take coffee (A. 34). He smoked his own cigarettes and those of the officers. When he first expressed a desire to smoke, one handcuff was released and thereafter one hand remained free (A. 42).

Petitioner makes no claim that physicial violence or threats of physical violence were used against him and acknowledges that at no time did the questioning by the police confuse him (A. 33).

At 8 P. M. Captain Eagan of the New Haven Police Department, came in to question Rogers. Eagan, who was acquainted with Rogers from a prior arrest, told Rogers that he did not have to say anything (A. 28) and that he could not promise him any benefit or reward (A. 385). During the course of the interrogation, Eagan informed Rogers that Mrs. Rogers would have to be questioned in order to ascertain whether he had said anything to her about the murder and he assured Rogers that during her questioning the two state wards who were then living with them would be taken care of at the Children's Center (A. 199, 316). At about 9 P. M. Eagan made a pretended call on a dead wire to hold a car and policewoman in readiness to bring Mrs. Rogers down for questioning. During the next hour Rogers was not questioned at all (A. 243). At about 10:30 P. M. Rogers

said he had been drinking that night (A. 200) and then proceeded to confess that he had shot and killed Mrs. Kennedy. Thereupon a court reporter was summoned and Rogers gave his confession while the reporter recorded it stenographically (A. 325). The confession consisted of thirty typewritten pages. At the outset Rogers related, largely in narrative form (A. 325-326), an elaborately fabricated and detailed story of (1) a six months adulterous relationship between the decedent and himself; and (2) a claim of provocation for the murder based upon profane and abusive remarks by the decedent to him just before the shooting. Throughout his confession Rogers answered questions freely and without hesitancy. On its completion shortly after 12 P. M. Rogers made oath to its truth.

The next day some seventeen hours later, Rogers gave a second confession to the coroner at his official inquest (A. 347-369). At the outset, the coroner fully informed Rogers of his right to counsel and his right to remain silent (A. 347-348). Rogers acknowledged his awareness of his rights and expressly declined the services of counsel.

Rogers was forty-eight years old, highly intelligent (A. 319), and the brother of a New Haven police officer. He had been arrested and interrogated by police on at least four occasions prior to the questioning on January 30th; the first time being in connection with a New York offense, the second after his arrest for violation of parole, the third for a liquor offense in 1949 in New Haven, the fourth his arrest on January 9th for the Travelers Hotel robbery (A. 195-196).

State Court Proceedings

On March 2, 1954, the Grand Jury returned an indictment charging Rogers with murder in the first degree in the perpetration of a robbery. Rogers was represented by counsel at all stages of the proceedings since.

During the course of his trial to the jury petitioner invoked his right to the so-called "orthodox" rule for testing the admissibility of confessions. Accordingly, the court excused the jury and heard evidence at great length as to the circumstances surrounding his confession to the police. At this preliminary hearing, Rogers testified and called witnesses in his own behalf, and the court excluded questions concerning the truth or falsity of the confession. The trial judge made thirty-seven express findings of fact (A. 314-317), including the specific finding that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney." Upon the conclusion of this preliminary hearing and after arguments by counsel, the court ruled that the confession was freely and voluntarily made. After this finding of voluntariness by the court, the jury in the course of the trial considered the same facts, claims and circumstances surrounding the making of the confession in determining its weight and credibility. A similar hearing in the absence of the jury was had upon the second confession to the coroner. Upon testimony produced at this hearing, the court specifically found that (1) "the accused did not ask to be represented by counsel" and (2) "the accused voluntarily chose to testify after hearing from the coroner that he was entitled to counsel and that anything he said might be used against him" (A. 319). The court concluded that this second confession also was voluntary.

There was substantial evidence other than the confession connecting Rogers with the murder, notably the ballistics evidence, possession of the murder weapon on the night of the murder (A. 56), his false report to the police that the gun had been stolen by persons unknown (A. 286); his possession of the murder gun at the time of his arrest (A. 196), his contradictory statements, first claiming that he won the gun in a "crap" game and afterwards admitting that he had in fact stolen it on the day of the murder (A. 285, 286). In defense, Rogers presented witnesses for the purpose of mitigating the penalty (A. 312), but offered

no evidence to controvert the truth of his confession of this murder (A. 317). The jury returned a verdict of guilty of murder in the first degree.

On appeal, the Supreme Court of Errors considered the circumstances surrounding the confessions and held that they were freely and voluntarily given and affirmed the conviction (A. 219) (O'SULLIVAN, J., dissenting). The ensuing petition for certiorari was denied by the Supreme Court of the United States.

FEDERAL PROCEEDINGS IN HABEAS CORPUS

Petitioner thereupon instituted this habeas corpus proceeding in the federal court below. Judge SMITH of the District Court made no examination of the state record or of the factual findings therein contained (A. 388), but instead conducted a hearing *de novo* for the purpose of making his own findings of historical fact. At that hearing Rogers testified that Captain Eagan had informed him that "I didn't have to say nothing to him" (A. 28); and three police officers testified that Rogers had made no request for counsel at any time during his interrogation (A. 41; 58, 66), thereby reinforcing the record testimony of Captain Eagan. Judge SMITH chose to disbelieve petitioner's acknowledgment that he was told of his right to remain silent (A. 176), but on the issue of request for counsel he chose to believe the accused and to repudiate the testimony of the four officers of the law (including Captain Eagan whom he had never seen) (A. 176) on the theory that the officers' recollection would naturally "coincide with the version they must subconsciously prefer" (B. 20). Judge SMITH thereupon ordered the sentences vacated (A. 176-180).

On respondent's motion for rehearing and to amend the findings, Judge SMITH refused to receive or consider the state trial record or the factual findings of the trial judge on the admissibility

of the confession and denied the motion for rehearing (A. 194-196).

On appeal, the Court of Appeals vacated the judgment of the District Court on the ground that Judge SMITH had failed "to call for and consider the trial record or so much thereof as related to the admissibility of the confessions" (B. 6); and on remand it directed that "Unless the judge below shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of *Brown* vs. *Allen*, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the state trial court. *Brown* vs. *Allen*, at pages 507-8." (B. 7).

In clarification of its opinion, the Court of Appeals on petition for rehearing pointed out that this limitation to the historical facts as found by the state court would not preclude the District Court from hearing additional "evidence material on the constitutional issue which the state court had excluded or as to which it had made no finding" (B. 8), even though no vital flaw is found in the state proceedings.

Petitioner's request to this Court for certiorari was denied per curiam with a short opinion. 357 U. S. 220.

On remand to the District Court, the respondent moved to disqualify Judge SMITH which motion was denied (B. 9).

The District Court thereupon received the entire transcript of the state proceedings (Record on Appeal, 1043-1714), the findings made by the state trial court (A. 314-320), the transcript of the preliminary hearing on the issue of the voluntariness of the confessions (Record of Appeal, 967-1041), the state court appellate record (A. 278-324) and Rogers' two confessions (A. 325-369).

With the complete record thus before him, Judge SMITH acknowledged that "the issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge" (B. 22) and that he could not find "any lack of fair hearing or procedural due process, or other basis for this court in its judicial discretion to consider evidence outside the state court record" (B. 20). Accordingly, he used the historical facts as found by the state court as the basis for his consideration of the constitutional issues and thereupon concluded that the writ should be discharged (B. 22). Petitioner thereafter moved for additional findings, which motion was denied by Judge SMITH (B. 33).

On appeal, the Court of Appeals affirmed, in an opinion by Judge MOORE in which Judge SWAN joined, with CLARK, C. J. dissenting (AP. 1-32). The Court held that the procedure adopted by Judge SMITH on remand was in full accord with *Brown* vs. *Allen* and with this Court's per curiam opinion (AP. 5), and found, after reviewing all of the circumstances, that neither confession was the product of coercion (AP. 11).

ARGUMENT

I

THE DECISION OF THE COURTS BELOW IS CORRECT

1. THE POWERS OF THE DISTRICT COURT ON HABEAS CORPUS SHOULD NOT BE ENLARGED TO PERMIT THE REJECTION OF THE HISTORICAL FACTS AS FOUND BY THE STATE TRIER, IN THE ABSENCE OF SPECIAL CIRCUMSTANCES.

On remand, Judge SMITH proceeded for the first time to examine the full state trial record. This record included not only the findings of the court as to the admissibility of the confessions and the transcript of the preliminary hearings thereon, but also the petitioner's claims in opposition to the admission of the con-

fessions, the petitioner's claims of proof and requests to charge as well as the testimony presented by the State and the defense, together with the confessions themselves (A. 314-320, Record on Appeal 967-1041, A. 278-324, A. 325-369, Record on Appeal 1043-1714).

Judge SMITH's objective was to determine "whether that record shows any lack of fair hearing or procedural due process or other basis for this Court in its judicial discretion to consider evidence outside the state court record" (B. 20). He recognized that "whether we call it a vital flaw or unusual circumstances, or a substantial ground for exercise of judicial discretion in granting a hearing, *something* must appear upon examination of the state court record to require a trial *de novo* of the fact issues" (B. 18). (Emphasis added.) He knew that he was privileged to "take additional testimony not considered by the state trial court on constitutional issues;" but that he might "not substitute his judgment on factual issues fully tried," where no vital flaw exists.

From his examination of the record, Judge SMITH found no unfairness or lack of due process and no circumstances warranting rejection of the historical facts as specifically found by the state trier (B. 20-22). Accordingly, he proceeded to make his own independent evaluation of these facts, and upon these facts based his constitutional determination that petitioner's rights were not violated.

Notwithstanding Judge SMITH's finding that "the issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge" (B. 22), petitioner contends that he should have made "a fresh federal inquiry into the underlying facts" (Petition p. 25). Petitioner asserts that even though Judge SMITH concluded that "there was no unfairness or lack of due process" in the state court's consideration of Rogers' credibility

(B. 20), he should have conducted a retrial to redetermine credibility.

In short, petitioner claims that the writ of habeas corpus vests a federal court with unbounded and unbridled discretion to hold a trial *de novo* of the factual issues; that a federal judge may at will and without legal standards to guide or govern him, repudiate basic historical facts acknowledged by him to have been fairly found by the state tribunal.

If petitioner's position were to prevail, full hearings and the remaking of historical facts would be required in all cases, even where, as here, the federal judge avers that the facts have been fairly found and nothing appears to warrant such a retrial. Judge CLARK, contrary to all his previous utterances, seems to adopt this view that the federal court should be permitted to remake the historical facts on the ground that the ensuing product would be superior to the state's factual findings (AP. 23).

The rule contended for by the petitioner would overturn *Brown* vs. *Allen* and all the host of cases that have consistently held that the constitutional issue must be determined on the historical facts found in the state record. Petitioner's proposal would repeatedly present the situation posed by the Court of Appeals:

> "Is a convicted state prisoner, having been unsuccessful before a jury of his peers or a judge, to be able via habeas corpus to have his case re-tried by some federal judge in the district of his incarceration and, if so, is the federal judge to have the right to re-determine the historical facts? . . . Take a single case. It is tried and appealed twice in a state court, certiorari is denied. Three, four or ten years later, a federal judge or appellate court takes a different view and decides to believe witness A instead of witnesses B and C as to coercion. Would it not have been better to have had the case tried originally before a federal judge so that the time and expense of the state proceedings could have been avoided?" (AP. 4-5).

To avoid such a chaotic condition, respondent respectfully submits that *some* standard, *some* test should be applied by a federal court before it rehears facts *de novo*. The procedure carefully formulated by Judge SMITH gives due recognition to the proper balance of federal-state relationships and yet protects the constitutional rights of the petitioner. His decision reveals that he fully understood that it was his duty *independently* to determine whether the petitioner's conviction may constitutionally stand and that the state court's findings, if fairly made, must serve only as the basis for the consideration of the constitutional issues (B. 19, 20). And on the other hand, if the subordinate findings of fact by the state trier were unfair or lacking in due process, he was free to order a hearing *de novo*. Thus, having first determined that the state trier fairly and conscientiously arrived at the factual findings, Judge SMITH properly exercised his own independent determination on the ultimate constitutional issue, by affirming the state trier's conclusion that the confessions were not coerced. *Thomas* vs. *Arizona*, 356 U. S. 390 (1958); *Brown* vs. *Allen*, *supra* at 504; *Palakiko* vs. *Harper*, 209 F. 2d 75, 80 (1953), *cert. denied* 347 U. S. 596.

Brown vs. *Allen* clearly supports the procedure adopted by Judge SMITH as affirmed by the majority opinion below. Both opinions in *Brown* vs. *Allen* (Mr. Justice REED and Mr. Justice FRANKFURTER) stress that the resolution of the historical facts differs from the determination of the federal constitutional issue. If the state record does not contain the basic or historical facts, the federal judge may hold a hearing *de novo* to ascertain them before determining the constitutional issue. On the other hand, if the state record specifically sets forth all the necessary historical facts, the federal judge should use these facts to make an independent evaluation of the federal constitutional issue.

> "In some cases the State court has held a hearing and rendered a decision based on specific findings of fact; there may have been review by a higher State court which had

before it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases."

Brown vs. *Allen, supra* at 504.

"On review here of state convictions, all those matters which are usually determined issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple."

Watts vs. *Indiana*, 338 U. S. 49, 50-51 (1949).

As set forth in *Gallegos* vs. *Nebraska*, 342 U. S. 55 (1951), the federal courts have the duty to make the ultimate determination as to the voluntary character of the confession but "we give deference to the (state's) conclusions on disputed and essential issues of what actually happened." See, also, *Thomas* vs. *Arizona, supra*; *United States* vs. *Murphy*, 2 Cir. 1955, 222 F. 2d 698, 706; *United States* vs. *Jackson*, 2 Cir., 1958, 256 F. 2d 7.

This is not to say, however, that even if the state record contains specific findings of historical facts, the federal judge may never hold a hearing *de novo*. Judge SMITH recognized that "if important evidence exists which the state trial court did not have before it, grounds would exist for exercise of discretion to retry the factual issues" (B. 19). Judge SMITH concluded that there was no need here to invoke this "additional evidence rule." To the rule requiring "vital flaw" or unusual circumstances, Judge SMITH gave a broad interpretation, adopting as his criterion:

"Whether we call it a vital flaw or unusual circumstances, or a substantial ground for exercise of judicial discretion in granting a hearing, something must appear upon examination of the state court record to require a trial *de novo* of the fact issues." (B. 18).

That such a standard is required is amply supported in the law. In *United States ex rel. Smith* vs. *Baldi*, 344 U. S. 561 at 569, this Court, in rejecting petitioner's contention that a plenary hearing should have been held, reaffirmed the principles of *Brown* vs. *Allen*, as follows:

> "Not unless special circumstances prevail, should the lowest federal court reverse the highest state court in cases where the constitutional issues have been disposed of on the merits by the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the state court and the allegations in the petition for the writ before the federal court fail to disclose that the state in its prosecution departed from the constitutional requirements . . .
>
> "This review of the proceedings accords with our holding in *Brown* case."
>
> "Nor has any territorial, state or federal court permitted habeas corpus to relitigate and redetermine issues already litigated to final appellate determination. To do so would cause litigation in criminal cases to be interminable and bring confusion into the administration of justice. A defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies . . . and then supersede those remedies on collateral attack by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them."
>
> *Palakiko* vs. *Harper, supra* at 80.

The respondent respectfully submits that Judge SMITH's decision as affirmed by the Court of Appeals establishes a well-defined and proper procedure for the lower federal court to follow when presented with a writ of habeas corpus.

2. THIS COURT'S PER CURIAM OPINION ON DENIAL OF CERTIORARI SANCTIONS THE PROCEDURE ADOPTED BY THE COURTS BELOW.

In denying certiorari, this Court stated:

> "We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* vs. *Allen*, 344 U. S. 443, 506 et seq." (B. 9).

Judge CLARK and the petitioner claim that Judge SMITH's interpretation of this Court's opinion reduces the federal constitutional review of coerced confessions to an illusion (AP. 23). However, Judge SMITH in fact gave to this Court's opinion the broadest possible scope and by no means set for himself the limitations claimed by Judge CLARK and the petitioner. Judge SMITH expressly states that this Court's opinion "makes it plain" that a federal judge, after review of the state record, may decide to take testimony *"even though no vital flaw is necessarily found."* (B. 18) (emphasis added). His opinion is abundantly clear that he did not consider a finding of "vital flaw" an indispensable prerequisite to a *de novo* hearing. He was however firmly of the opinion that he must adopt some standard to govern the exercise of his discretion to conduct a retrial (B. 18). Accordingly he proceeded to formulate what appears to be a most liberal standard, prescribing that whether it be labelled "vital flaw" or "unusual circumstance" or "substantial ground for exercise of judicial discretion" or "some other basis," there must be "something" to justify a hearing *de novo*. The majority of the Court of Appeals recognized the liberal test employed by Judge SMITH on remand:

> "Judge SMITH's own understanding of the broad scope of his power and review upon the remand is vital to a proper determination of this appeal. He did not regard

himself as foreclosed from exercising his independent judgment or as in the role of a rubber stamp upon state court conclusions. To him 'the question here is whether on review of the full trial court record (which he had not had before him when he delivered his previous opinion), testimony should be considered in a trial *de novo*.' He knew that he was privileged to 'take additional testimony not considered by the state trial court on constitutional issues, such as lack of due process by the use of coerced confessions, and make an independent determination of the facts, such as the voluntary character of confessions, and (that he) must independently determine whether the conviction may constitutionally stand' but that he might 'not substitute his judgment on factual issues fairly tried (i.e. where no vital flaw exists) before a state court on similar evidence.'" (AP. 3).

Under these broad standards Judge SMITH examined the state record and concluded therefrom that the issues as found by the state trier were in full accord with due process of law, and that there were no "circumstances" which would warrant the exercise of his discretion to make new factual findings (B. 20, 21). Accordingly, using the historical facts as fairly found by the trial court, Judge SMITH determined that there was no denial of constitutional rights (B. 22).

3. THE COURTS BELOW WERE JUSTIFIED IN ACCEPTING THE STATE COURT'S FINDING THAT ROGERS DID NOT REQUEST COUNSEL.

Judge SMITH specifically cites this issue as having been "fully and conscientiously tried by an experienced judge" (B. 22). The finding was based upon the trier's unassailable right to observe the witnesses and to pass judgment on their credibility. Rogers testified that he made a request for counsel to Eagan during the evening as well as to another detective in the afternoon. In direct contradiction, Eagan testified that Rogers made no

request for counsel during the evening (A. 233) and that the other officers[1] did not report any such request having been made in the afternoon (A. 237). Under these circumstances, Rogers' testimony cannot possibly be put into the category of an undisputed fact, as petitioner strives to do.[2] The trial court disbelieved Rogers and credited the testimony of Captain Eagan. Thus, the finding has adequate support in the evidence and is properly inclusive of the entire period of questioning.

In his attack on this particular finding, petitioner makes much of the fact that it was filed five months after trial (Petitioner's Brief, pp. 29-30). True, the formal finding was filed in conformity with prescribed appellate procedure, but obviously the *fact* was found by the court directly after hearing the conflicting testimony of Rogers and Eagan on this point. It cannot seriously be contended that this finding, "fully and conscientiously tried by an experienced judge" (B. 22), does not truly represent his conclusion from the evidence produced at the time of trial.

Nor is there any basis for petitioner's statement that this finding "was apparently disbelieved by the State Appellate Court" (Petitioner's Brief, p. 4). Petitioner has merely grasped words out of context and thereby distorted the true meaning of the majority opinion.

---

[1]It should be noted that at the hearing held by Judge SMITH these three officers testified that Rogers in fact made no request for counsel at any time during the afternoon (A. 41, 58, 66). Captain Eagan did not appear as a witness before Judge SMITH.

[2]Moreover, under Connecticut law, "A fact is not undisputed merely because one or more witnesses testified to it and no one denied it, for the trial court may not give credence to the witnesses and that is for it to determine."

Maltbie, *Appellate Procedure*, 2nd Ed. 1957, Sec. 158
Corvo vs. *Waterbury*, 141 Conn. 719, 724 (1954).
Clark vs. *Haggard*, 141 Conn. 668, 674 (1954).

4. The Courts Below Were Justified in Concluding that Petitioner's Constitutional Rights Were Not Violated by the Use of His Confessions at the Trial.

The test of voluntariness is "whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime." *Lyons* vs. *Oklahoma*, 322 U. S. 596, 602. Applying this test to the circumstances here it cannot be said that the courts below erred in determining that the confessions were voluntary.

Certainly, Rogers' removal from jail without a court order could have no coercive effect, since he was unaware of it. The questioning was not of such length or character as to be coercive. As pointed out by the Court of Appeals, "Rogers was not an indicted defendant but a suspect who was being questioned in the course of an unsolved crime."[3] Aside from his extensive prior police experience,[4] he acknowledges an explicit reminder by Eagan of his right to say nothing (A. 28, A. 358). His wife was a legitimate subject of police inquiry.[5] The claim now so glibly made, that she was "crippled" was not asserted by counsel at the trial for the obvious reason that the judge observing her in court each day, could see for himself that she was in no way disabled.[6]

---

[3]*Crooker* vs. *California*, 357 U. S. 433, *Cecenia* vs. *Lagay*, 357 U. S. 504; *In re Groban's Petition*, 352 U. S. 330.

[4]This experience stems from his four prior arrests. That he was in no awe of police officers, is demonstrated by his brashness in going to the police on the day following the murder and falsely reporting his nephew's gun stolen by persons unknown.

[5]See *Stein* vs. *New York*, *supra* 184, *Voght* vs. *United States*, 5 Cir., 156 F. 2d 308, 312, *Hawkins* vs. *United States*, D. C. Cir., 158 F. 2d 652, 653-654; *cert. den.* 331 U. S. 830.

[6]Moreover, in testifying at the trial for the purpose of mitigating the penalty, Mrs. Rogers made no claim of being crippled. (Testimony of Mrs. Rogers, Record on Appeal.)

Faced with this fact, defense counsel wisely chose not to include this "threat" in the "two grounds" which they specified against the admission of the confession into evidence (A. 303).

All of the surrounding facts and circumstances in this case impel the conclusion that the primary underlying cause for Rogers' confession was not solicitude for his wife but his realization of the formidable evidence of his guilt already in the hands of the police and his desire to put the best possible face on the crime which he could no longer deny. His thirty page confession was not an abject capitulation. His statements were not supine attempts to give desired responses to leading questions but were the considered product of his mental processes in his effort to serve best his own self-interest.

The second confession was made to the coroner some sixteen or seventeen hours after the police questioning had ceased and after the coroner advised Rogers of his rights to counsel and to remain silent. Rogers acknowledged that he understood his rights (A. 40), and readily repeated his confession.

A review of the facts of the leading cases of this Court clearly reveal that the circumstances surrounding the petitioner's confessions, either singly or in combination, fall far short of rendering his confessions invalid. See, *Lisinba* vs. *California*, 314 U. S. 219 (1941); *Stroble* vs. *California*, 343 U. S. 181 (1952); *Gallegos* vs. *Nebraska, supra; Palakiko* vs. *Harper, supra; Stein* vs. *New York, supra.*

II

THERE IS NO CONFLICT IN DECISIONS

Judge CLARK cites a list of authorities to justify his statement that a federal court may "make its own revaluation of the basic facts" (AP. 23). But respondent has never disputed the power of the federal court to "revalue" historical facts in order inde-

pendently to determine the constitutional issues. Our concern is with the "remaking" of facts fairly found by the state court. The cases cited by Judge CLARK and petitioner clearly support our contention that, in the absence of special circumstances, a federal court may not "remake" the historical facts.

In *Leyra* vs. *Denno*, 347 U. S. 556, this Court at page 558 states "The question for our decision is therefore whether the present confessions were so coerced . . . We therefore *examine the circumstances as shown by the undisputed facts* of this case." (emphasis added)

In *Payne* vs. *Arkansas*, 356 U. S. 560 at 562, this Court again stressed that a state court's findings of fact if fairly made upon substantial and conflicting testimony, as to the circumstances surrounding the contested confession "are not this Court's concern." (In the present case, Judge SMITH specifically found that the state trier's findings of historical facts were fairly and conscientiously made by an experienced judge (B. 22).

It was solely in the light of the historical facts in the record that this Court made its review of the constitutional issues in *Fikes* vs. *Alabama*, 352 U. S. 191.

In *U. S. ex rel. Corbo* vs. *LaVallee*, 2 Cir., 270 F. 2d 513. (CLARK, C. J., being one of the presiding judges), the Court considered only the "undisputed evidence" and "undisputed facts" in determining the constitutional issues.

In *U. S. ex rel. Sileo* vs. *Martin*, 2 Cir., 269 F. 2d 586, SMITH, J., writing for an unanimous Court, specifically employed the "unusual circumstances" or "vital flaw" test, before ordering the lower federal court to hold a hearing *de novo*. The "vital flaw", in this case arose from the lack of specific findings of historical facts.

In *U. S. ex rel. Wade* vs. *Jackson*, 2 Cir., 256 F. 2d 7, *cert. denied* 357 U. S. 908 (CLARK, C. J., sitting on the panel), the

Court expressly states at page 13 that "'it is not our province" to pass on credibility of police witnesses but that the function of the federal court is "to make (its) own independent examination of the record to determine whether on the basis of the undisputed facts there is any merit to the claim," 256 F. 2d at page 9. (In the case at bar, Judge SMITH, after searching the state record and finding no reason not to accept the state trier's historical facts, made his independent determination of the constitutional issue upon those facts, precisely as sanctioned by Judge CLARK in the *Wade* case.)

In *U. S. ex rel. Savini* vs. *Jackson*, 250 F. 2d 349, 351, and *U. S. ex rel. Alvarez* vs. *Murphy*, 2 Cir., 246 F. 2d 871, 265 F. 2d 497, the Court of Appeals examined the record in the light of the undisputed facts.

Similarly, in *U. S. ex rel. Caminito* vs. *Murphy*, 222 F. 2d 698, *cert. denied* 350 U. S. 896 (CLARK, C. J., sitting on the panel), the Court of Appeals expressly determined the constitutional issue on the undisputed facts and ignored all parts of relator's testimony which were disputed by police officers and, therefore, made no attempt to retry the credibility of witnesses. Chief Judge CLARK, in his concurring opinion, stated that:

> ". . . I doubt the utility for dignified or effective law enforcement of review and overturn by a federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals" and ". . . I can respect the views of the state judges as rationally developed, even though I must disagree."
>
> 222 F. 2d at 706.

Throughout these proceedings, the petitioner has placed great reliance on *Cranor* vs. *Gonzalez*, 9 Cir., 226 F. 2d 83. The Court of Appeals, in its first opinion, held that this reliance "is misplaced," *Rogers* vs. *Richmond*, 252 F. 2d at 810, and points out the "obvious" distinction between *Cranor* where "there was no

express finding as to the voluntariness of the confession in the state court," and the instant case where the trial judge in conformity with (the 'orthodox') rule held a hearing before trial, made express findings, and concluded that the confessions were each voluntary," 252 F. 2d at 810.

Thus in *Cranor*, in the absence of a record which it might consult the Court actually had no alternative but to exercise its discretion to ascertain the facts for itself. This lack of facts in itself was tantamount to a "vital flaw," 252 F. 2d at 810.

CONCLUSION

The respondent respectfully prays that this Court deny certiorari and allow the decision of the Court of Appeals to stand.

Respectfully submitted,

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Counsel for Respondent.

In forma pauperis
Petition not printed

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 40

HAROLD D. ROGERS,

Petitioner,

vs.

MARK S. RICHMOND, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The first degree murder conviction which is challenged in this habeas corpus proceeding was sustained by the Connecticut Supreme Court in an opinion (R. 219) reported as *State* v. *Rogers*, 143 Conn. 167, 120 A.2d 409, *cert. denied*, 351 U.S. 952 (1956). The dissenting opinion of Justice O'Sullivan (R. 226) is reported at 143 Conn. at 178, 120 A.2d at 414.

The first opinion by Chief Judge Smith of the District Court for the District of Connecticut, sustaining the writ of habeas corpus (R. 176), is reported as *U. S. ex rel. Rogers*

v. *Cummings*, 154 F. Supp. 663 (1956). Judge Smith's opinion denying rehearing (R. 194) is unreported.

The first opinion of the Court of Appeals for the Second Circuit (R. 391), vacating the judgment of the District Court, is reported at 252 F.2d 807 (1958); its opinion denying rehearing (R. 409) is reported at 252 F.2d 812. The opinion denying petitioner's motion for a stay of the Court of Appeals' mandate (R. 415) is unreported.

The opinion of this Court, which accompanied its denial of the writ of certiorari to the Court of Appeals (R. 417), is reported at 357 U.S. 220 (1958).

On remand to the District Court, Judge Smith filed two opinions: The first, overruling respondent's motion that Judge Smith disqualify himself (R. 418), is reported at 178 F. Supp. 44 (1958). The second, discharging the writ of habeas corpus previously issued (R. 426), is reported at 178 F. Supp. 69.

The opinion of the Court of Appeals, affirming dismissal of the writ (R. 452), is reported at 271 F.2d 364 (1959). The dissenting opinion of Chief Judge Clark (R. 472) is reported at 271 F.2d 375.

Jurisdiction

The judgment of the Court of Appeals was entered on October 28, 1959 (R. 472). On November 12, 1959, the Court of Appeals stayed issuance of its mandate for thirty days. The petition for writ of certiorari was filed on December 10, 1959, and was granted February 23, 1960. 361 U.S. 959 (R. 489). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

The foundation of this case is the due process clause of the Fourteenth Amendment. One of the important legal questions presented relates to the proper administration of relevant sections of the Judicial Code governing habeas corpus procedures. 28 U.S.C. §2241, *et seq.* These are set forth in Appendix B, *infra*. Two Connecticut statutes, relating to the illegal detention aspect of this case and the coroner's purported justification for holding petitioner incommunicado, are §§6-70 and 54-15 (Conn. Gen. Stat., 1958 Rev.). The Connecticut statutes are also set forth in Appendix B, *infra*.

Questions Presented

1. Did the courts below fail to follow this Court's opinion denying certiorari in this case, 357 U.S. 220, when they held that a district judge sitting in habeas corpus is bound *exclusively* by the state court "findings" unless the state trial transcript discloses a "vital flaw" or some other closely comparable circumstance?

2. Was it error—even assuming, *arguendo*, that a "vital flaw" or some other closely comparable circumstance is needed to authorize rejection of a state court basic "finding" and to hear testimony anew—for the courts below to fail to recognize the defective "finding" relative to petitioner's request for counsel as precisely such a "vital flaw" or circumstance, when that "finding" (1) conflicts with uncontradicted evidence before the state court, (2) was formulated by the State's Attorney and adopted verbatim by the state court, five months after petitioner's trial, as a procedural step in the state appellate process, and (3) was apparently disbelieved by the state appellate court?

3. Did the courts below, in effect, abdicate to the state courts the duty of the federal District Court to determine independently the constitutional issue of the voluntariness of the confessions?

4. Even assuming, *arguendo*, that the courts below were bound by the state court "finding" that petitioner did not ask to see his lawyer during his first interrogation, do the facts, which are undisputed on the state trial transcript, standing alone, as Judge Clark concluded, add up to a coercive pattern which voids the incriminating statements and the conviction and death sentence based thereon?

5. Did the State authorities, in denying petitioner's request to consult his privately retained counsel and in denying counsel's request for consultation with petitioner prior to petitioner's making statements incriminating him in a capital crime, deprive petitioner of the right to effective aid of counsel guaranteed in capital cases by the due process clause of the Fourteenth Amendment?

Statement

In this habeas corpus action petitioner challenges on Fourteenth Amendment grounds the validity of his 1954 conviction of murder in a Connecticut state court. For the purpose of this statement, proceedings over the last six years are dealt with in three parts: (I). The events in the state courts terminating in petitioner's unsuccessful petition to this Court for a writ of certiorari to review the judgment of affirmance of the Connecticut Supreme Court of Errors. 351 U.S. 952. (II). The first phase of the federal habeas corpus proceeding initiated in the United States District Court for the District of Connecticut in 1956, and terminated in 1958 with this Court's denial *with opinion*, 357 U.S. 220, of petitioner's application for a writ of cer-

tiorari to review the judgment of the Court of Appeals for the Second Circuit which had vacated the District Court judgment sustaining the writ of habeas corpus. (III). The events in the District Court and the Court of Appeals subsequent to this Court's opinion denying certiorari.

I. *Proceedings in the State Courts*

Petitioner Harold D. Rogers, a Negro with an eighth grade education (R. 176), has been confined in a death cell at Connecticut's Wethersfield State Prison for over six years (R. 175). In May of 1954 he was tried in the Superior Court of New Haven County for the fatal shooting of Dorothy Kennedy in the course of the robbery of her husband's liquor store on November 21, 1953 (R. 279, 283). Petitioner was found guilty by the jury, and thereafter was sentenced to death (R. 171, 172).

At petitioner's trial, the chief evidence against him, in addition to his possession of what was alleged to be the weapon which shot Mrs. Kennedy, consisted of two incriminating statements (R. 325-369) elicited from petitioner after lengthy interrogations on January 30 and 31, 1954, at a time when he was in custody and awaiting trial for a quite unrelated charge of attempted robbery of a New Haven, Connecticut, hotel (R. 176; Pet. Ex. B, R. 485, 6).

At the trial, petitioner objected on Fourteenth Amendment grounds to the admission in evidence of the two incriminating statements (R. 303, 304, 307), but the trial judge overruled the objections and the statements were submitted to the jury (R. 307, 310, 317, 320). Petitioner was found guilty by the jury and thereafter was sentenced to death (R. 171, 172).

One hundred thirty-five days after the jury returned its verdict (R. 282, 322) the trial judge—as a part of the process for preparing the case for appeal to the Connec-

ticut Supreme Court of Errors—adopted as his own and filed lengthy "findings" prepared by the State's Attorney with respect to the admissibility of the incriminating statements (R. 314-320). The state court's "findings" dealing with the admissibility of the incriminating statements were annexed as an appendix to the opinion by the court below (R. 465-472). A certified copy of the suggested "findings" given the state court by the State's Attorney is reproduced in Appendix A to this brief, *infra*, along with the state trial court's "findings."

On appeal, the Connecticut Supreme Court of Errors, in an opinion by Justice Wynne, affirmed petitioner's conviction. The state court characterized the issue before it as "whether, under these and other circumstances of the case, that conduct [surrounding the making of the statements] induced the defendant to confess falsely that he had committed the crime being investigated" and, at another point, "whether this conduct induced the defendant to make an involuntary and hence untrue statement" (R. 222, 223). Justice O'Sullivan, expressing particular concern with the fact that petitioner had not been permitted to consult his previously-retained counsel[1] and noting that "[t]hose who

[1] As has been noted, petitioner was in custody awaiting trial on a charge of attempted robbery and other related crimes (Pet. Ex. B; R. 485, 6) at the time the New Haven police started interrogating him in connection with the shooting of Mrs. Kennedy. As the police well knew (R. 60), petitioner had theretofore, for three weeks prior to this interrogation, been represented by his own privately-retained attorney, the late Thomas R. Robinson (and also by Mr. Robinson's then associate, Chester T. Corse). Mr. Robinson (and Mr. Corse) continued to represent petitioner in connection with the more serious murder charge. The basis of this representation changed in a single respect—i.e., that after the graver charges were preferred and petitioner's limited funds were exhausted, Mr. Robinson represented petitioner in Mr. Robinson's public capacity as Public Defender for New Haven County rather than pursuant to the private retainer which had been the initial form of the attorney-client relationship.

As Public Defender Mr. Robinson represented petitioner throughout the murder trial in the state courts, on appeal to the Con-

become suspect do not thereby become the chattels, so to speak, of the investigators," dissented (R. 229).

This Court denied certiorari. 351 U.S. 952 (1956).

II. *The Habeas Corpus Proceeding: First Phase*

On August 22, 1956, petitioner, pursuant to 28 U.S.C. §2241 *et seq.*, sought a writ of habeas corpus, alleging that the use of the incriminating statements and the State's denial of consultation with counsel invalidated the Connecticut judgment (R. 152-167). Petitioner requested a "full and complete hearing" and relief from his unconstitutional detention (R. 166).

On August 23, 1956, Chief Judge Smith of the District Court for the District of Connecticut ordered a hearing on the petition for August 31, 1956 (R. 166-167). At the hearing, respondent[2] filed his return to the writ, in which

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necticut Supreme Court of Errors, on the first petition for certiorari in this Court to obtain direct review of the conviction, and in the first phase of the present habeas corpus proceeding. In 1957, after Judge Smith had granted habeas corpus and while the case was pending before the Court of Appeals for the first time, Mr. Robinson died. He was succeeded as Public Defender for New Haven County by the late Lawrence M. Dooley, who represented petitioner before the Court of Appeals at the time of the first appeal.

After the decision of the Court of Appeals vacating Judge Smith's first judgment Mr. Dooley sought, but was unable to secure from former Chief Justice Wynne of the Connecticut Supreme Court of Errors, the authorization which under the Connecticut practice a Public Defender must have in order to prepare a petition for certiorari for filing in this Court (R. 412). Thereafter, Mr. Dooley received permission to withdraw as petitioner's counsel (R. 413). In subsequent proceedings petitioner has been represented by one or both of petitioner's present counsel pursuant to orders of appointment successively entered by the Court of Appeals and Judge Smith (R. 450, 451).

[2] Originally, there were three named respondents in this action due to the fact that the administration of the Connecticut State Prison was in a transition stage. This explains occasional references in the record to "respondents," e.g. R. 182. On October 29, 1956, the present warden, Mark S. Richmond, was substituted as party respondent (R. 73).

he denied the substantive allegations of the writ, but made no objection to the holding of the August 31, 1956 hearing (R. 169). At the hearing, Judge Smith heard testimony from all of the witnesses called both by petitioner and by the State's Attorney and accepted all documentary evidence submitted by both parties (R. 4-73). Respondent, who called three witnesses on his behalf and cross-examined the three called on behalf of petitioner (R. 2), at no time objected to the taking of testimony at the hearing (R. 4-73).

The documentary evidence submitted by the parties included almost all of the transcript of the testimony taken by the state trial judge in passing on the admissibility of the challenged confessions. The only testimony taken before the state trial judge which was not submitted to Judge Smith in documentary form was that of two witnesses called by petitioner, Deputy Jailer Patterson and Sheriff Redding. Patterson was cross-examined by the State for less than a page, and Redding was not cross-examined at all (R. 435-446). Both Patterson and Redding, called as witnesses by petitioner, testified in person before Judge Smith at the August 31, 1956 hearing (R. 5-20) and were cross-examined by the State's Attorney (R. 15, 16, 19). Judge Smith also heard the testimony of petitioner, called in his own behalf (R. 20-41), and the testimony of three police officers who had not testified at the state trial, who were called on behalf of respondent (R. 41-73).

With all of the evidence offered by the parties before him, Judge Smith, on September 19, 1956, found as follows:

> "Rogers was arrested in New Haven January 9, 1954, charged with attempted robbery of the Travelers Hotel on that date. He retained counsel, and on January 13, 1954, waived examination in New Haven City Court and was bound over for trial to the Superior Court,

April Term. While he was lodged in New Haven County Jail, on the morning of January 30, 1954, ballistic tests on a gun found in his possession at the time of his arrest determined that it had been used in the fatal shooting of Mrs. Kennedy in the holdup of a liquor store in West Haven on the evening of November 21, 1953. The gun had been stolen from his niece's house prior to the evening of November 21, 1953. On the order of the state's attorney he was removed from the jail without court order for questioning at the state's attorney's office. Until he confessed he was kept unavailable to his counsel. He claims that he was denied a request to see his counsel, which request the state's witnesses deny was made. That he made such a request seems most probable, and the Court finds that it was made. He was not warned of his right to say nothing or that what he said could be used against him. Questioned intermittently for some eight hours by the county detective, two New Haven and two West Haven police in relays, during which the gun was on the table before him, he steadfastly denied implication in the Kennedy shooting. He was handcuffed, but was allowed to smoke. He was given coffee and hamburg, one hand being released from the cuffs, which were then fastened to the chair arm, while he smoked and ate. He was taken to the men's room when he requested it. No physical violence or threats of physical violence were used. When the interrogators were unable to obtain any admission in the eight hour questioning, Captain Eagan of the New Haven police was called in. After questioning for some time, Capt. Eagan threatened to bring in for questioning Rogers' wife if Rogers did not confess. He threatened to send the two foster children of the Rogers', who were state wards, to an institution meanwhile. Mrs. Rogers suf-

fered from arthritis, but was able to attend the trial. Eagan made a pretended telephone call on a dead wire to hold a car and officers in readiness to get Mrs. Rogers and the children. He then gave Rogers an hour to make up his mind whether to confess. At the end of that time he took the phone to pretend to order Mrs. Rogers and the children brought in. At this point Rogers gave in and made a confession, completed at 1:00 a.m., 13 hours after the beginning of the questioning. He was then returned to the jail. The next morning, January 31, the coroner gave an oral order that Rogers be held incommunicado. His counsel called at the jail, but on orders of the state's attorney was denied access to him. Rogers was taken to the coroner's office where he was for the first time warned of his rights not to make a statement and to have counsel, but still fearing that the threat to take into custody his wife and children would be carried out, if the original confession was repudiated, he repeated it for the coroner. One or two days thereafter the order that he be held incommunicado was rescinded. On his trial the confessions were admitted in evidence, the court finding on preliminary hearing in the absence of a jury that they were voluntary, and submitting to the jury the question of the weight to be given them, but refusing a requested instruction that the jury might disregard them in whole or in part if it found them involuntary. The confessions were the result of pressure overcoming Rogers' powers of resistance and were not voluntary on his part." 154 F. Supp. 664-65 (R. 176-177).

On the basis of these detailed and carefully considered findings, Judge Smith articulated their constitutional implications:

"Rogers gave in to a threat which in itself, separated from the surrounding circumstances, might not be likely to cause a confession to a capital crime. It was applied, however, after more than eight hours of questioning, at a place removed from the jail, by which time it must have been obvious to Rogers that the counsel he had engaged was not to be allowed to see him and advise him on the new charge of a capital offense. That charge was first made known to him after his removal from the jail that day. The state's treatment of Rogers as a chattel of the investigators (see dissenting opinion of O'Sullivan, J., *State* v. *Rogers,* 143 Conn. 167, 181, 129 A.2d 409) moved around regardless of law and denied access to counsel must have had a coercive effect. We may give it weight in conjunction with other facts even if we do not hold illegal treatment in itself necessarily productive in every case of a coerced confession violative of due process. When Rogers gave in to the threat to bring in his wife and children it must be held under all the circumstances here that he lacked sufficient mental freedom to make his confession voluntary. Its use in the trial to convict him is not consonant with the requirements of due process. The second confession the next day while still held incommunicado, although pro forma at least advised of a right to counsel; is also of doubtful admissibility. In any case, since the first coerced confession was admitted in evidence, and it cannot be said from the record what weight was given it, the judgment of conviction is invalid. *Stein* v. *New York,* 346 U.S. 156, 191-192, 73 S.Ct. 1077; *Cranor* v. *Gonzales,* supra, 226 F.2d.at page 90.

Rogers may be a thoroughly depraved individual, but his execution on a conviction based on confessions obtained under the circumstances outlined in this case

may well establish a precedent endangering innocent men in the future. Constitutional safeguards would be weakened by a finding that confessions so obtained may be considered voluntary and in accord with present concepts of due process of law." 154 F. Supp. at 666-67 (R. 179-180).

In consonance with these conclusions, Judge Smith ordered petitioner discharged from custody unless granted a new trial (R. 181).

The State's Attorney subsequently filed a 51 paragraph affidavit (R. 182-194) in support of respondent's motion to amend and supplement findings and for a rehearing, which raised no objection to the fact that Judge Smith held the August 31, 1956 hearing. At the hearing on the motion to amend respondent submitted as exhibits: the state court "findings" filed some five months after the trial (R. 284, 322), contained in the appellate record for the Supreme Court of Errors (R. 278-324), the two incriminating statements elicited from petitioner (R. 325-346, 347-369), and the State's brief in the Supreme Court of Errors (R. 370-389). Judge Smith made seven additional findings primarily for purposes of amplification of the time element and denied rehearing (R. 195-196). The four exhibits submitted by the State's Attorney were rejected by Judge Smith on the ground that there was no "sufficient allegation of any evidence which by due diligence could not have been presented at the original hearing to justify a new trial or rehearing" (R. 195).

On appeal, for the first time respondent attacked the propriety of Judge Smith's holding a hearing and his failure to call for the limited part of the state record not furnished by the parties. The Court of Appeals vacated the judgment of the District Court and remanded for fur-

ther proceedings (R. 399). The Court of Appeals concluded that Judge Smith had erred in failing "to call for and consider the trial record or so much thereof as related to the admissibility of the confessions . . . " (R. 397).

> "We conclude, therefore, that on remand the judge below should take such steps as will assure him that he has in evidence not only the findings of the trial court as to the admissibility of the confessions, but also the transcript of the preliminary hearing on which the trial findings were based." 252 F.2d at 811 (R. 398).

Having remanded the case to the District Court for consideration of the minor portion of the state court record not submitted to the District Court prior to its decision, the Court of Appeals went on to hold that on remand Judge Smith should, unless extraordinary circumstances present themselves, confine himself exclusively to the state trial court's "findings":

> "Unless the judge below shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of *Brown* v. *Allen* (344 U.S. 443), we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the state trial court." 252 F.2d at 811 (R. 398-399).

Feeling that the opinion of the Court of Appeals was a misapplication of this Court's decision in *Brown* v. *Allen*, 344 U.S. 443 (1953), petitioner sought rehearing (R. 400-409). The petition was denied in an opinion in which the Court of Appeals stated that in "no respect do we deviate from our original opinion" (R. 411).

Petitioner then sought a writ of certiorari to review the judgment of the Court of Appeals. This Court denied the

petition for certiorari, *Rogers* v. *Richmond*, 357 U.S. 220 (1958) (R. 417-418), and accompanied its denial with the following *per curiam* opinion:

> "The petition for writ of certiorari is denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen*, 344 U.S. 443, 506, *et seq.*" (R. 418).

III. *The Habeas Corpus Proceeding: The Present Phase*

On remand to the District Court, the State's Attorney moved to disqualify Judge Smith. The affidavit of respondent, Warden Mark S. Richmond, accompanying the motion, alleged that Judge Smith had, as evidenced by his original decision sustaining the writ of habeas corpus, "a prejudgment of the issues in this case and a personal bias against the detectives involved and in favor of the cause of the relator" (R. 418). After argument, Judge Smith ordered the affidavit accompanying the motion stricken as being insufficient and denied the State's Attorney's motion (R. 450). A formal opinion was filed on July 16, 1958. 178 F. Supp. 44 (R. 418-425).

On July 15, 1958, in compliance with the Court of Appeals' directive to consider all the state court testimony and "findings" relating to the character of the confessions, the District Court received in evidence the "findings" relating to the admissibility of petitioner's incriminating statement filed by the state trial court subsequent to the trial (R. 314-320) and the state court transcript of the testimony of the five witnesses who testified in the absence of the jury on the issue of the voluntariness of the incriminating statements (R. 450). As noted, a transcript of the testimony of three of these five witnesses (Pet. Ex. F,

R. 230-263, 73) had been received in evidence by Judge Smith at the first hearing in 1956. Subsequently, on September 26, 1958, the District Court received in evidence the entire state trial transcript (Res. Ex. X, R. 451), the alleged incriminating statements (Res. Ex. AB, R. 325-346, 451; Res. Ex. AC, R. 347-369, 451) and the state court appellate record (Res. Ex. AA, R. 278-324, 451).

On October 13, 1958, Judge Smith entered a judgment dismissing the petition for habeas corpus (R. 435). His memorandum opinion (R. 426-435) explained at length why, under the instructions of the Court of Appeals as interpreted by this Court's opinion denying certiorari, he felt obliged to decide against petitioner *even though he still felt that petitioner's conviction and death sentence were the product of a denial of petitioner's rights under the Fourteenth Amendment* (R. 433-434).

The paradox is explained by Judge Smith's conclusion that "under the limitations now applied" (R. 434) he was not authorized to take testimony on the voluntariness of the challenged confessions—or to consider the testimony he had already taken—unless the state transcript disclosed a "vital flaw" in the state court's inquiry or such other (unspecified) "unusual circumstance" as would "justify such a course" (R. 430-431). Since he found no such "vital flaw" or other "circumstances", he felt compelled to decide the constitutional issues on the basis of the historical facts found by the trial court.

The District Court followed the strict dictate of the Court of Appeals command to "confine itself to analyzing the historical facts as found by the state trial court" (R. 427-428), although recognizing that "on its face" this Court's opinion meant:

> "... The District Judge, after examining the record of the state proceedings, is free to accept the state factual

> determinations in those proceedings and base his constitutional determination thereon, or to reject them and call for testimony on which to base his constitutional determinations, unless his examination of the state proceedings reveals some 'vital flaw', in which instance the implication is that he cannot accept the state determination but *must* call for testimony" (R. 429). (Emphasis in original.)

Judge Smith rejected this "face" meaning of this Court's opinion. In terms of concrete factual analysis this meant that he also felt obliged to reject his own conclusion that petitioner had asked to see his lawyer during the first interrogation in deference to the contrary state court "findings"—filed five months after the trial—that petitioner had made no such request (R. 317). Nor did Judge Smith regard the state court's "findings" on this issue a "vital flaw" or "unusual circumstance" which would permit him to reject the state "findings" or to take note of the testimony *he* had taken. Judge Smith refused to consider the "findings" on the counsel point a "vital flaw" or "unusual circumstance" even though Chief Eagan, the only State's witness before the state judge who even purported to dispute petitioner's claim that he had asked to see his lawyer, was not present for the first seven hours of the interrogation, the period of time during which petitioner testified he asked to see his lawyer:

> "... It is true, as relator claims, that the positive finding of no request has no support in the evidence for the time (some seven hours) prior to Chief Eagan's arrival, since the only testimony as to that period was Rogers' testimony that he had made the request. However, the burden was on Rogers, and elimination of the positive finding of no request would leave him no better off, if the judge disbelieved his testimony, as he

appears to have done. The judge ruled at the conclusion of the hearing that the confessions were voluntary, even though the formal findings were not made until months later. This court on trial of the same issue de novo credited Rogers' statement that he had asked to see his counsel, although the recollection of the police officers at that time, some two and one half years after the questioning, was that he had not made such a request. It is quite natural for their recollection after so long a period to coincide with the version they must subconsciously prefer. The probabilities are strong that a prisoner represented on another charge by able counsel of many years experience as public defender, when questioned intermittently for hours on the commission of a capital crime would ask to see his lawyer. In that respect the subordinate findings differ. Such a finding depended on observation of Rogers on the stand and judgment as to Rogers' credibility as a witness. There was no unfairness or lack of due process in the consideration of this issue in the state court, although on similar evidence, if properly before it, this court would reach the opposite finding" (R. 432, 433).

Judge Smith's conclusion that he could not re-examine the state court's "findings" that petitioner had not asked for counsel was of crucial importance; he made it plain that were he at liberty to reject the state "finding" and to give weight to the testimony he had taken and credit his own judgment on this "historical fact," he would have persisted in his original holding that petitioner's conviction was void:

"... Were these confessions the free and voluntary acts of Rogers or was his will so overborne by pressures that they should be considered the product of coercion?

The state court decided the former, this court would find the latter on underlying facts found, differing in the respects mentioned, if this court were free to reject the state court findings and try the issue de novo. The pressures used, aside from the deprivation of counsel, were not as great as those used and condemned in many cases. Yet, there was the illegal removal from the jail to the office for interrogation, the illegal holding incommunicado, denial of access to his lawyer, questioning by different officers for some eight hours intermittently in relays, the faked phone calls about his wife and children, finally succeeding by inducing Rogers to abandon his denials and make the confession, repeated the next day before the coroner. Aside from the denial of access to counsel, the other circumstances might not singly or together have broken down his resistance. On the facts as they appeared to this court, taken together, against the background of his knowledge that although he had counsel he would not be permitted to reach him, it seemed reasonable to conclude that they overbore his will to resist and brought about a confession not truly voluntary or free" (R. 433, 434).

However, said Judge Smith:

"Considering the full state trial record anew, to determine whether other evidence should be considered, however, and ignoring as we must for this purpose the impressions made on the trial here, there do not appear to be any circumstances which under the limitations now applied would permit retrial here of the issue of voluntariness of the confessions" (R. 434).

Even though Judge Smith did state that the district judge "must independently determine whether the con-

viction may constitutionally stand" (R. 432), certain language in his opinion indicates that he not only deferred to the state trial judge's belated "findings" with respect to the basic facts, but also to the state judge's conclusion as to the coercion issue:

> "... This court is bound by the findings of the state trial court that no request for counsel was made, *and that the confessions were voluntary* ..." (R. 430). (Emphasis added.)

Simultaneously with the issuance of his opinion on remand, Judge Smith, on his own motion, issued a certificate for probable cause for appeal (R. 435) and later authorized petitioner to proceed *in forma pauperis* (R. 451). On November 13, 1958, petitioner appealed to the Court of Appeals (R. 451) which heard the appeal on April 13, 1959.

On October 28, 1959, the Court of Appeals affirmed Judge Smith's decision in an opinion by Judge Moore in which Judge Swan joined (R. 452-472). Chief Judge Clark filed a dissenting opinion (R. 472-482).

Judge Moore and Judge Swan held that Judge Smith had complied with the Court of Appeals' mandate, as interpreted by this Court, in confining his attention exclusively to the "findings" belatedly entered by the state trial judge—"findings" which Judges Moore and Swan regarded as important enough to annex to their opinion as an appendix (R. 465-472). The majority also held that, on the assumption that petitioner had not asked to see his lawyer, Judge Smith's second conclusion that the confessions were voluntary was not "clearly erroneous" (R. 462, 463).

Judge Clark, in dissent, viewed this Court's opinion denying certiorari as a substantial qualification of the Court of Appeals' earlier mandate—an "actual denigration of our previous decision" (R. 478). This placed Judge

Smith in "somewhat of a dilemma in having two appellate masters to serve" (R. 479). Understanding Judge Smith's difficulty, Judge Clark concluded that Judge Smith "was too modest and that under the Supreme Court ruling he was both entitled and bound to act normally as a judge and thus to credit his own natural and sincere judicial conclusions" (R. 479). Judge Clark demonstrated that under the scope of review adopted by the majority of the Court of Appeals "federal constitutional review of coerced confessions . . . will become quite, if not wholly illusory"—a "rubber stamp" of the state holding (R. 479, 480).

Alternatively, Judge Clark concluded that, even if Judge Smith were compelled to accept the state court "finding" that petitioner had not asked to see his previously retained counsel, the state conviction had to be set aside:

> "For it seems to me that on the admitted and incontrovertible facts these confessions cannot be considered 'voluntary' in any real meaning of the word—indeed, that however they may be characterized, that adjective is singularly inappropriate" (R. 473).

Finally, Judge Clark, from his wealth of knowledge of Connecticut procedure, took strong exception to the majority's reliance on the state court "findings"—both from the probative point of view and as being equivalent to judicial findings of fact in the conventional sense of the term:

> "My brothers attach such importance to the detailed and numbered findings of the state trial court that they reproduce this material in their appendix. Now the basic facts there recited, without the embellishments added, do show the far from voluntary character of the confessions. But in thus lending emphasis to these

elaborations upon the underlying facts, I think my brothers have overlooked the unique character of findings of fact in Connecticut appellate practice; for there they serve only as steps in appeal, and not as aids to the adjudication itself. So on all appeals, civil and criminal, and in jury as well as court cases, findings are made after the judgment, but only on request of the appellant and with both sides submitting drafts thereof. Conn. Prac. Bk. 1951, §§385-400, 406, 410, and Forms 558-563; Maltbie, Appellate Procedure in the Supreme Court of Errors of Connecticut 129 (2d Ed. 1957). In practice the judge tends quite naturally to accept the version presented by the party for whom he has decided. So here the findings were filed five months after the decision and trial and were those presented by the State. Hence they include what are quite obviously argumentative conclusions or deductions which are not facts in any true sense, but do properly represent the State's claims as to the ultimate judgment to be rendered" (R. 475, 476).

On November 12, 1959, the Court of Appeals stayed issuance of its mandate for thirty days to permit the preparation and filing of a petition for writ of certiorari. On December 10, 1959, petitioner filed his motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari, both of which this Court granted on February 23, 1960 (R. 489).

Summary of Argument

Without objection by respondent, Chief Judge Smith of the District Court for the District of Connecticut held a hearing in this habeas corpus action and accepted all documentary evidence offered by both parties. At the hearing,

respondent called three witnesses on the State's behalf and cross-examined the three called on behalf of petitioner. With all the evidence before him, Judge Smith concluded that "The confessions were the result of pressure overcoming Rogers' power of resistance and were not voluntary on his part" (R. 176, 177).

On appeal the Court of Appeals vacated the District Court judgment and ordered Judge Smith to make his determination on the coercion issue exclusively on the basis of the state court "findings of fact"—"findings" which, as Judge Clark noted in dissent on the second appeal, "serve only as steps in appeal and not as aids to the adjudication itself" (R. 475) and which were filed five months after the trial and adopted verbatim from suggested "findings" filed by the State.

On remand Judge Smith again noted the coerced nature of the confessions (R. 433, 434), but under the "limitations" imposed by the Court of Appeals considered himself bound to the state court "findings"—including the "finding," which, as Judge Smith pointed out, has "no support in the evidence" (R. 432), that petitioner had not requested counsel at the first of two interrogations to which he was subjected (which was the first time he was advised that he was to be questioned about a murder charge rather than about the very different charge for which he was in custody). The majority below affirmed the limited review adopted by Judge Smith on remand.

I. This Court has noted that "where there is a genuine conflict of evidence, great reliance must be placed upon the finder of fact," *Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960), but the judgment of the Court of Appeals preventing Judge Smith from adjudicating the blatant deprivations of constitutional rights would distort this salutary rule by finding "genuine conflict" where there is

none and by demanding uncritical aequiescence in the recitations of a state "finder of fact".

Certainly, the blatant defectiveness of the state court "findings" is ample justification for a district court to hold a hearing—particularly when, as here, the hearing was never objected to by respondent until the matter reached the Court of Appeals—or, at the very minimum, to examine uncontradicted testimony given in the state trial. To bind the District Court exclusively to the state court "findings," as the Court of Appeals has done, and thus to sacrifice petitioner's life on the altar of findings of this sort would (1) render the Fourteenth Amendment an "illusory safeguard," *Blackburn* v. *Alabama, supra,* 361 U.S. at 209, and (2) undercut the power given "the lower federal courts . . . "—as an expression of the choice of Congress for the assertion of the "superior authority of federal law"—"to inquire into federal claims by way of habeas corpus." *Brown* v. *Allen,* 344 U.S. 443, 508, 509, 510 (1953).

The successive rulings of the court below effectively emasculated the discretion of the District Court to conduct a hearing intended to "better enable . . . that court to determine whether any violation of the Fourteenth Amendment occurred." *Brown* v. *Allen, supra,* 344 U.S. at 478. And, indeed, those rulings ignore the opinion of this Court in *this very case*:

> "We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen,* 344 U.S. 443, 506 *et seq.*" (R. 418).

Upon emancipating the District Court from the limited review which chained it to the state court's "findings," this Court should affirm Judge Smith's original conclusion that both of petitioner's statements were coerced (R. 177). Actually, Judge Smith's conclusion that the two statements were coerced was the only conclusion he could reach on the evidence properly before him. Manifestly, that conclusion is not "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure. Indeed, respondent has never claimed as much.

II. Even if the evidence adduced at the August 31, 1956 habeas corpus hearing is ignored, the facts which are undisputed on the state trial transcript add up, as Judge Clark pointed out in his dissent below (R. 473-475), to a coercive pattern which voids petitioner's incriminating statements, his conviction, and the death sentence, under the traditional principles which this Court has adopted for reviewing confessions challenged under the Fourteenth Amendment.

III. Moreover, the State, in denying petitioner's request to consult his previously retained counsel when he first learned he was a murder suspect and in denying his counsel's request for consultation with petitioner the following day, deprived petitioner of the right to effective aid of counsel guaranteed in capital cases by the due process clause of the Fourteenth Amendment. These two deprivations of counsel (from each of which, it may be noted, an incriminating statement ensued) form an alternative basis upon which this Court should instruct the District Court to issue the writ invalidating the challenged statements and petitioner's conviction and death sentence.

I. In Binding the District Judge "Exclusively" to the State Trial Judge's "Findings"—When the "Findings" Were Contrary to the Undisputed Testimony in the State Court Transcript—the Court of Appeals Ignored This Court's Prescription for the Resolution of Due Process Issues Arising in State Criminal Prosecutions.

A. A State Court Finding Which Has "No Support in the Evidence" Cannot Foreclose a District Court's Fresh Inquiry Into Uncontradicted Testimony.

As Judge Smith recognized on remand, the crucial state court "finding" [3] that petitioner did not ask "at any time" (R. 468) to see his attorney has "no support in the evidence" (R. 432). Although he realized the significance of the defective "finding" with respect to the due process issue at stake—"aside from the denial of access to counsel, the other circumstances might not singly or together have broken down his resistance" (R. 434)—Judge Smith was obligated, under instructions of the Court of Appeals, to determine the constitutional issues exclusively on the basis

[3] Under Connecticut appellate procedure, the Finding is a lengthy recapitulation of events in the trial court prepared by the trial judge, after receipt of a draft finding by the appellant and a counter finding by the appellee. Connecticut Practice Book §389 (1951 Ed.); Maltbie, Connecticut Appellate Procedure §§129, 130 (2 Ed. 1957). Under the literal Connecticut nomenclature, the Finding, then, refers to the entire document adopted by the trial judge and includes the claims of the plaintiff as to facts proved; the claims of the defendant as to facts proved; the requests to charge; the charge as given; and the rulings made in the course of the trial. Maltbie, *supra*, §144. The entire Finding in petitioner's state court case covers 38 pages (R. 284-322). As used by the courts below, however, the term "findings" refers not to the 145 numbered paragraphs in the entire Finding, but to the 61 specific paragraphs which refer to the admissibility of petitioner's two incriminating statements (R. 314-320). These are attached as an appendix to the opinion of the court below (R. 465-472). Petitioner, in this brief, uses the term in the non-literal sense used by the courts below.

of the state trial judge's "findings" (R. 399, 427). As Chief Judge Clark emphasized, in dissent in the court below, whether or not petitioner asked to consult counsel "is obviously important, as *everyone* seems to concede that if the request was made and refused the confessions cannot be received" (R. 473). (Emphasis added.)

In affirming Judge Smith's exclusive reliance on the state trier's "findings", the Court of Appeals noted: "we see no valid reason for substituting the intuitive inferences of an able and conscientious federal judge . . . for those of an able and conscientious state trial judge . . . " (R. 461).

Of course there is "valid reason". The immediate and transcendent reason is that the state trial court's "finding" that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney" (R. 468) has, as Judge Smith pointed out, "no support in the evidence" (R. 432); whereas Judge Smith's finding that petitioner did request counsel (R. 176, 433) has, as Judge Clark pointed out, "solid support of record in Rogers' very explicit testimony and in the natural probabilities" (R. 476).

The only witness at the state trial who even appears to speak to the issue concerning petitioner's request for his lawyer was Chief Eagan, who, by his own testimony, *did not* (and, indeed, could not) *testify about the period when he, Eagan, was not present and when petitioner, according to petitioner's testimony, first asked for counsel* (R. 233, 237). Chief Eagan merely denied that petitioner asked *him* for permission to consult counsel, and Chief Eagan admitted that he did not inform petitioner that he was entitled to counsel and that "Under the circumstances, I don't think I would" have informed counsel if a request to speak to him had been made (R. 237). The State did not, in the state court trial, seek to refute petitioner's testimony that

he asked to see his lawyer (R. 241) by calling any of the detectives who were present prior to Chief Eagan's arrival when the claimed requests for counsel were made. *Indeed, two of these detectives—whom the State might have called but elected not to—were physically present in the state court during the trial* (R. 64, 67, 70).[4]

Having heard petitioner's testimony and the testimony of the three detectives whom the State finally decided to call to testify at the August 31, 1956 habeas corpus hearing two and a half years after the events described took place, Judge Smith found:

> "He [petitioner] claims that he was denied a request to see his counsel, which request the state's witnesses deny was made. That he made such a request seems most probable, and the Court finds that it was made" (R. 176).[5]

On remand, reflecting upon this issue for the second time, Judge Smith made it clear that if he were not bound by the state court "findings" he would rule that petitioner requested to see his attorney at the State's Attorney's

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[4] The failure of the State to call the available detectives to rebut petitioner's testimony in the state trial cannot be in any way justified on the basis of inadvertence. The attorney representing petitioner at the trial challenged the State to refute petitioner's testimony:

> ". . . I would assume that the State would wish to make at least some claim with regard to the two o'clock period to which this witness [Eagan] says—about which this witness says he knows nothing . . ." (R. 239).

[5] On the basis of this finding in the initial decision by Judge Smith, respondent, on remand, moved for the disqualification of Judge Smith because he showed a "personal bias against the detectives involved and in favor of the cause of the relator Rogers" (R. 418). Judge Smith ordered the affidavit accompanying the motion stricken as being insufficient and denied the State's Attorney's motion. 178 F. Supp. 44 (R. 450).

office—and he amplified his reason for crediting petitioner's testimony in preference to that of the detectives:

> "This court on trial of the same issue de novo credited Rogers' statement that he had asked to see his counsel, although the recollection of the police officers at that time, some two and one half years after the questioning, was that he had not made such a request. It is quite natural for their recollection after so long a period to coincide with the version they must subconsciously prefer. The probabilities are strong that a prisoner represented on another charge by able counsel of many years experience as public defender, when questioned intermittently for hours on the commission of a capital crime would ask to see his lawyer" (R. 433).

In view of the overwhelming likelihood—stressed by Judge Smith and Judge Clark—that petitioner would have wanted to communicate with his previously retained lawyer as soon as he found himself a murder suspect, it is hardly surprising that the majority of the Connecticut Supreme Court of Errors assumed (R. 222)—and that Justice O'Sullivan in his dissent flatly stated (R. 227)—that petitioner *had* asked to see his lawyer.

The Court below attempted to justify its command that there must be exclusive reliance on the state court "findings" by claiming the two triers reached different conclusions as to petitioner's credibility (R. 461). However, even if the state judge disbelieved petitioner's uncontradicted testimony, there would be no basis for him to make a positive finding to the contrary. Nor is there any justification for the implication by the court below that the testimony of petitioner and Chief Eagan was in conflict (R. 461). Chief Eagan admitted he knew nothing of what petitioner had said prior to his arrival (R. 237)—the period

when petitioner said he first asked for counsel. "The Fourteenth Amendment would be an illusory safeguard indeed if testimony of this nature were held to raise a 'conflict' which would preclude . . . review . . . " *Blackburn* v. *Alabama, supra*, 361 U.S. at 209.

In applying the constitutional standards which the due process clause ordains as limitations upon state criminal prosecutions, this Court in the *Blackburn* case recently has determined that "[W]here there is a genuine conflict of evidence, great reliance must be placed upon the finder of fact." 361 U.S. at 208. In *Blackburn*, "[A]fter according all of the deference to the trial judge's decision which is compatible with our duty to determine constitutional questions," 361 U.S. at 205, this Court ruled that a counter deposition supplied by the state was in "such hopeless internal conflict that it raises no genuine issue of fact," 361 U.S. at 209, with the depositions of two psychiatrists submitted by Blackburn. In the case at bar, then, where there was no contrary evidence concerning petitioner's request for counsel prior to Chief Eagan's arrival (R. 432), there is no genuine conflict. And, as *Blackburn* demonstrates, absent a genuine conflict of evidence, a federal tribunal is not foreclosed, by the label of "findings," from an inquiry of undisputed testimony.*

In binding Judge Smith "exclusively" to the "findings"—the most crucial of which had, in Judge Smith's view,

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* The *Blackburn* case, to be sure, was heard by this Court on direct review of the decision of the Alabama Court of Appeals. However, in *Cicenia* v. *Lagay*, 357 U.S. 504 (1958), a habeas corpus action reviewed by this Court on its writ of certiorari to the United States Court of Appeals for the Third Circuit, this Court applied its familiar undisputed facts doctrine: "An *independent examination* of the record satisfies us that . . . " 357 U.S. at 508. (Emphasis added.)

"no support in the evidence" (R. 432)—the Court of Appeals established for Judge Smith a scope of review more constricted than the inquiry of this Court over state convictions on direct review. For under the "undisputed facts" scope of review, a state court finding—contrary to the uncontradicted testimony in the record—cannot foreclose this Court from considering the undisputed testimony:

"... [facts undisputed by the state] means not only admitted facts but also those that can be classified from the record as without substantial challenge." *Gallegos* v. *Nebraska*, 342 U.S. 55, 61 (1951).

"Where the claim is that the prisoner's statement has been procured by such means [coercion] we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. *If the evidence bearing on the question is uncontradicted*, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court . . . " *Lisenba* v. *California*, 314 U.S. 219, at 237-238 (1941). (Emphasis added.)

"Enforcement of the criminal laws of the States rests principally with the state courts, and generally their findings of fact, fairly made upon substantial and conflicting testimony as to the circumstances producing the contested confession—*as distinguished from inadequately supported findings or conclusions drawn from uncontroverted happenings*—are not this Court's concern; yet where the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious. 'The performance

of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both.'" *Payne* v. *Arkansas*, 356 U.S. 560, 561, 562 (1958). (Emphasis added.)

If undisputed testimony can be viewed by this Court despite state court "findings" to the contrary, then the district courts—which, unlike this Court, are equipped to hold hearings, 28 U.S.C. §2241-55 (1952)—should most certainly be afforded the same leeway. For the Congress has also chosen the district courts, not just exclusively this Court, to express the "superior authority of federal law." *Brown* v. *Allen*, *supra*, 344 U.S. at 510.

As Judge Clark, profoundly expert in his own state's procedure, so clearly demonstrated, the majority below "overlooked the unique character of findings of fact in Connecticut appellate practice; for there they serve only as steps in appeal, and not as aids to the adjudication itself. . . . So here the findings were filed five months after the decision and trial and were those presented by the State" (R. 475).

Moreover, Judge Clark detailed the insufficiency of the "findings" on other facts besides the counsel point:

> "Hence they include what are quite obviously argumentative conclusions or deductions which are not facts in any true sense, but do properly represent the State's claims as to the ultimate judgment to be rendered. An example is No. 103: 'The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth.' Certainly no judge can know this as a fact; he can only deduce it as a conclusion and one (I submit) with no obvious support in the record.

"Particularly to be noted in this connection are the mutually inconsistent or alternative claims of Nos. 105 and 106; the first asserts that the delivery of Rogers to the State's Attorney's Office and his presence there on January 30 were not unlawful, while the second states that if there were illegality in that regard the accused was not aware of it, and it had no effect upon his confession. My brothers made much of this for reasons which are not clear to me. We are called upon to decide whether the admitted compulsion placed upon the accused transcended the bounds of due process. It would seem that the legality of his immediate detention would be a factor of some importance in making this test, while his knowledge or lack thereof of this one detail of illegality would be unimportant in the over-all picture of compulsion. *U. S. ex rel. Wade* v. *Jackson*, 2 Cir., 256 F.2d 7, 13, certiorari denied *Jackson* v. *U. S. ex rel. Wade*, 357 U.S. 908; . . . *Turner* v. *Pennsylvania*, 338 U.S. 62, 64, 66, 67 . . . " 271 F.2d at 376, 377 (R. 475, 476).

The state trial court's "finding" on the request for counsel, as noted, was a crucial factor in the end result reached by the courts below. The defectiveness of the state court "finding" was ample justification—whether that justification be termed a vital flaw or something else—for rejecting the state court "findings," hearing testimony, and making a new finding.

The sanctification imposed by the Court of Appeals on the defective "findings" will allow the State to take a life without affording what the district judge considers to be the minimum requirements of due process. Tolerance of such a result constitutes a completely unwarranted deference to the state's rights at the sacrifice of federal constitutional rights, and would surely render the Fourteenth

Amendment an "illusory safeguard." *Blackburn* v. *Alabama*, *supra*, 361 U.S. at 209.

B. The Plenary Hearing Held by the District Court on August 31, 1956 Without Objection by Respondent Was in Accord With the Dictates of This Court in *Brown* v. *Allen* and This Very Case.

In its initial opinion, the Court of Appeals, relying primarily "on the *Brown* v. *Allen* opinion as a whole and the expressed concern of this Court for federal-state relations" (R. 399), directed the district judge to make the necessary constitutional determination on the basis of the state trial judge's "findings." And, on appeal the second time, the court below affirmed Judge Smith's determination to ignore, under the "limitations now applied, . . . the impressions made on the trial here" (R. 434). In failing to allow Judge Smith to consider the testimony taken without objection by respondent, the court below blocked out of judicial being crucial underlying facts the existence of which the district judge had previously acknowledged, and thereby authorized the State of Connecticut to deprive petitioner of his life despite the constitutional deprivation which Judge Smith twice recognized.

This Court has, however, in *Brown* v. *Allen* and in the brief opinion in this very case, authenticated the propriety

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Quite significantly, the Court of Appeals for the Second Circuit appears to have lost its reverence for the Connecticut "Findings of Fact." In *Reid* v. *Richmond*, 277 F.2d 702 (2 Cir., 1960), a habeas corpus appeal decided after the opinion of the Court of Appeals in this action, the Court stated:

> "The Findings of Fact made by the State [Connecticut] trial judge shed some light on their [referring to the circumstances surrounding the making of the confessions] content, but due to the absence of the trial transcript, which we assume to be still available, we are reluctant to give these findings *any consideration*." 277 F.2d at 704 (Emphasis added).

of a district court holding a hearing on matters canvassed in the state court. In *Brown* v. *Allen*, *supra*, 344 U.S. at 463-4, Mr. Justice Reed acknowledged that "a repetition of the trial is not required,"[5] and then added, significantly, "However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution."

This pronouncement by Mr. Justice Reed, as well as the statement by Mr. Justice Frankfurter that "Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge *may* accept their determination in the State proceeding and deny the application," 344 U.S. at 506 (emphasis added)—to which this Court made pointed reference in its opinion denying certiorari (R. 418)—clearly endorse the propriety of the habeas corpus hearing held in this case. Ignoring the proper meaning of the statements by Mr. Justice Reed and Mr. Justice Frankfurter, the decision by the Court of Appeals to reject testimony adduced at the hearing without objection by respondent is, petitioner submits, the product of a discrepant interpretation of this Court's opinions in *Brown* v. *Allen*.

Moreover, it must be remembered that three separate cases—the procedural history of which differed in a significant respect—were decided together, under the name of *Brown* v. *Allen*. From the last paragraph of the Court of Appeals' initial opinion (R. 399), it is clear that the court below reached its conclusion to exclude the testimony which Judge Smith heard solely from this Court's consideration of *Brown* v. *Allen*, No. 32, the only one of the three cases dis-

[5] The statement to the effect that a hearing is not "required"—upon which the court below relied (R. 393)—is, of course, beside the mark here. Petitioner did not argue that the hearing was "required" but that it was within the court's discretion to hold the hearing.

posed of by the *Brown* v. *Allen* opinion where the District Court made its decision solely on the basis of the state record. However, in *Speller* v. *Allen*, No. 22, and *Daniels* v. *Allen*, No. 20, the District Court *did* hold hearings on the factual issues even though they had before them the full record of the state proceedings. In both of these cases the constitutional issues presented on habeas corpus had been determined in a hearing before the state court trial judge who had made specific findings on the issue, as the District Court pointed out in its decisions, reported *sub nom.*, *Daniels* v. *Crawford*, 99 F. Supp. 208, 213 (1951); *Speller* v. *Crawford*, 99 F. Supp. 92, 95 (1951).

There was no need for the court below to transpose from this Court's language in the situation where the District Court held no hearing to determine this Court's view when the District Court does hold a hearing. Mr. Justice Reed, speaking for the Court, noted no objection to the holding of a hearing in the *Daniels* case and specifically approved the propriety of the District Court holding a hearing in the *Speller* case although neither the District Court nor this Court had noted a "vital flaw" or "unusual circumstance" in the state proceedings:

> "The petition . . . raised again the same federal question which had been passed upon by both North Carolina courts and which had been offered to this court on petition for certiorari, racial discrimination. *The District Court heard all additional evidence the petitioner offered. This was in its discretion. Moore* v. *Dempsey;* 261 U.S. 86; *Barr* v. *Burford*, 339 U.S. at 214, cases which establish the power of federal district courts to protect the constitutional rights of state prisoners after the exhaustion of state remedies. *It better enabled that court to determine whether any violation of the Fourteenth Amendment occurred.*"

Brown v. *Allen*, *supra*, 344 U.S. at 478. (Emphasis added.)

But, more to the point, the propriety of a plenary hearing was the precise issue to which this Court addressed itself *in this very litigation*, in its opinion denying certiorari from the first judgment of the Court of Appeals.[9] For this Court said that it "read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the state court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony" (R. 417, 418). This Court clearly stated that the district judge was not bound by the state court determination, and might take testimony, even though no "vital flaw" infected the state court inquiry.[10] But Judge Smith and the majority below transposed the equation and read this Court as insisting on a "vital flaw" or some "circumstance" closely approximating such fundamental error as the latchkey to a fresh federal inquiry into the underlying facts.

Judge Smith recognized that "on its face" this Court's opinion meant that:

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[9] Presumably there is no controversy that this Court's opinion established the law of the case for subsequent proceedings. Even though an opinion on denial of certiorari is unusual, "when the reasons are given, the decision to deny will have the effect indicated by the reasons stated." Opinion of Mr. Justice Frankfurter in *Brown* v. *Allen*, *supra*, 344 U.S. at 489. Nor can this be otherwise when the opinion construes the decision of a lower court; it is this Court's interpretation of the mandates of inferior federal courts which is decisive. *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940); *Labor Board* v. *Donnelly*, 330 U.S. 219, 227 (1947).

[10] Commentators were quick to note that this Court, by its *per curiam* opinion on the denial of certiorari, recognized the propriety of the District Court holding a hearing. 1 Moore, Federal Practice par. 0.404 [6] n. 1 (2d ed. 1959); Notes, 58 Col. L. Rev. 895 (1958), 68 Yale L. J. 98, 103 (1958); Comment, 53 Northwestern L. R. 765, 772 (1959).

"... the District Judge, after examining the record of the state proceedings, is free to accept the state factual determinations in those proceedings and base his constitutional determination thereon, or to reject them and call for testimony on which to base his constitutional determinations, unless his examination of the state proceedings reveals some 'vital flaw,' in which instance the implication is that he cannot accept the state determination but *must* call for testimony" (R. 429). (Emphasis in original.)

In rejecting the "face" value view of this Court's opinion, the action of the courts below was premised on a manifestly incorrect reading of this Court's opinion. This Court's opinion was, as Judge Clark noted, an "actual denigration of our previous decision, while failing to reverse it outright" (R. 478). And, as Judge Clark emphasized:

"Naturally Judge Smith faced somewhat of a dilemma in having two appellate masters to serve, while he did have to act in the light of the fact that his earlier decision stood reversed. I am quite clear, however, that he was too modest and that under the Supreme Court ruling he was both entitled and bound to act normally as a judge and thus to credit his own natural and sincere judicial conclusions" (R. 479).

The testimony taken at the August 31, 1956 plenary hearing in the case at bar, then, is hardly entitled to be excluded, as the courts below have done. Moreover, even assuming, *arguendo*, the impropriety of holding the original hearing, the state's actions do not justify exclusion of the testimony taken. Respondent here made no objection to the taking of testimony, in its return to the writ (R. 169), at the hearing (R. 5-73), or on the motion for rehearing (R. 73-152, 182-194). It called witnesses on its own behalf and examined

those called on behalf of petitioner (R. 5-73). In the *Speller* case, at the outset of the hearing, the state filed a motion to discharge the writ without taking evidence. Reserving decision on this motion, the District Court held the hearing and took evidence. The state objected to every question asked by petitioner and moved to strike the answer in each instance. In every case where the state examined the witness, the questions were propounded after the state reiterated its objection to the taking of all the evidence. At the conclusion of the evidence, the state renewed its motion and it was denied, 99 F. Supp. at 95. If, under the *Speller* circumstances, a hearing "better enabled that court to determine whether any violation of the Fourteenth Amendment occurred," 344 U.S. at 478, a hearing in the case at bar, unobjected to by respondent, was certainly in order.

Even as late as the proceedings on remand, respondent conceded the propriety of the hearing in two important aspects: (1) whether or not petitioner received a warning of his rights during the prolonged interrogation of January 30, 1954 at the State's Attorney's office and (2) whether or not petitioner asked to consult his counsel during the afternoon interrogation prior to the arrival of Captain Eagan:

> "Mr. Ullman: Now, I say that that afternoon session in which there was an absence of testimony, the accused did not request counsel, is in the same category as if there were a point on which no finding was made. For instance, the State Trial Court did not make a finding that the accused was warned. I say that it is altogether conceivable that in the absence of such a finding, this Court can make a finding, but that isn't in the category of vital flaw; that is in the category of the additional evidence which the Court may receive even where there is no vital flaw, and that is set forth

in the clarifying opinion of the Circuit Court. Evidence excluded, or evidence as to which no finding is made on those points pertinent to the Constitutional issue, this Court may receive evidence, but it is not receiving it on the basis that there is a vital flaw." (Record on Appeal. 668-669).[11]

And, the hearing in one sense benefited the State. In the application for the writ, petitioner alleged he asked for counsel (R. 154). The state judge—with no evidence to the contrary—nevertheless made a contrary "finding." But in determining what action to take on the petition, the District Court was obligated to take allegations of undisputed facts in the petition as true. *Hawk* v. *Olson*, 326 U.S. 271, 277-79 (1945). At the hearing, then, respondent had an opportunity to refute petitioner's testimony, which it had not elected to do with the available detectives at the state trial (R. 432, 461). That Judge Smith found against the State after hearing the State's witnesses on this point (R. 176), does not, of course, justify a position that a hearing was not tolerable at the outset.

Most certainly, then, the August 31, 1956 hearing was in accord with the dictates of this Court. Respondent's tardy objection to the holding of a hearing only serves to emphasize that it was the conclusion arrived at as a result of the hearing, not the hearing itself, which disturbed the State. And, if there need be some "vital flaw" or unusual circumstance to justify the hearing, the character of the state court "findings"—as detailed in Judge Clark's dissent below—constitutes such a flaw or circumstance.

[11] By stipulation on file in this Court, the parties have agreed that reference may be made to unprinted portions of the record. The entire certified record is on file with the Clerk of this Court.

C. Judge Smith's Initial Conclusion That "The Confessions Were the Result of Pressure Overcoming Rogers' Power of Resistance" Should Be Reaffirmed by This Court Because This Conclusion—Arrived at Without Deference to the Defective State Court "Findings"—Is Fully Supported by the Evidence.

Upon emancipating the District Court from the restricted scope of review imposed by the Court of Appeals it is appropriate for this Court to examine the merits of the petitioner's constitutional claims upon the federal trial judge's consideration of the evidence taken at the August 31, 1956 hearing. Unhampered by the defective historical "finding" in regard to the request for counsel, Judge Smith, free to reflect on all the testimony and documentary evidence offered at the August 31, 1956 hearing (including the vast bulk of the testimony taken in the state trial court on the coercion issue), ruled that "The confessions were the result of pressure overcoming Rogers' power of resistance and were not voluntary on his part" (R. 177).

Upon consideration of a twelve-page affidavit (R. 182-194) attacking this conclusion, Judge Smith, in denying the State's request for a rehearing ruled again that the State's allegations were "not sufficient to support a finding on the main issue, the involuntary character of the first confession, at variance with the finding entered" (R. 195). And upon remand from the Court of Appeals and this Court, Judge Smith noted that:

"... there was the illegal removal from the jail to the office for interrogation, the illegal holding incommunicado, denial of access to his lawyer, questioning by different officers for some eight hours intermittently in relays, the faked phone calls about his wife and children, finally succeeding by inducing Rogers to aban-

don his denials and make the confession, repeated the next day before the coroner. Aside from the denial of access to counsel, the other circumstances might not singly or together have broken his resistance. On the facts as they appeared to this court, taken together, against the background of his knowledge that although he had counsel he would not be permitted to reach him, it seemed reasonable to conclude that they overbore his will to resist and brought about a confession not truly voluntary or free" (R. 434).

In holding the second statement likewise to be coerced, Judge Smith added:

"The next morning, January 31, the coroner gave an oral order that Rogers be held incommunicado. His counsel called at the jail, but on orders of the state's attorney was denied access to him. Rogers was taken to the coroner's office where he was for the first time warned of his rights not to make a statement and to have counsel, but still fearing that the threat to take into custody his wife and children would be carried out if the original confession was repudiated, he repeated it for the coroner. One or two days thereafter the order that he be held incommunicado was rescinded" (R. 177).

If this Court frees Judge Smith from the binding effect of the state court basic "findings"—as indeed, petitioner submits, it must—Judge Smith's initial ruling that both of petitioner's incriminating statements were coerced should be affirmed and this court should remand with instructions to issue the requested writ of habeas corpus.

In reviewing the decision of the court below on the merits, the question for this Court is whether Judge

Smith's initial ruling that the statements were coerced is "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. *Wade v. Mayo*, 334 U.S. 672, 682-684 (1948). Significantly, respondent has never claimed that Judge Smith's determination that the incriminating statements were coerced is clearly erroneous, although the State has previously argued that petitioner had a burden of presenting "clear and convincing" proof on the coercion issue. Actually, Judge Smith's conclusion that both of petitioner's statements were coerced was the only conclusion he could reach on the evidence properly before him.

Specific language in Judge Smith's remand opinion indicates he felt bound "by the findings of the state trial court that . . . the confessions were voluntary . . . " (R. 430). Even if this statement did not literally manifest Judge Smith's interpretation of his duty, it is clear that by binding Judge Smith exclusively to the defective state court "findings" and forcing him to reject the testimony taken without objection by respondent, the majority below, as Judge Clark noted, rendered "federal constitutional review of coerced confessions . . . quite, if not wholly, illusory" (R. 479) and forced the District Court to "rubber stamp the state holding" (R. 480).

II. Under This Court's Traditional Principles for Determining the Character of Confessions Challenged Under the Fourteenth Amendment, the Facts Undisputed on the State Trial Transcript Add Up to a Coercive Pattern Which Voids Petitioner's Incriminating Statements, His Conviction, and the Resulting Death Sentence.

Shorn of the added "embellishments" of the state court "findings"—many of which, as Judge Clark noted, "are quite obviously argumentative conclusions or deductions[12] which are not facts in any true sense" (R. 475)—the historical facts apparent from the face of the state court transcript demonstrate that the use of the two incriminating statements against petitioner was offensive to due process of law. Even if this Court were to endorse the Court of Appeals' obliteration of the testimony heard by Judge Smith, it should rectify the constitutional deprivation on the basis of the uncontradicted testimony in the state court transcript which indicates that the confessions were the "product of sustained pressure by the police" and not the "expression of free choice." *Watts* v. *Indiana*, 338 U.S. 49, 53 (1949).

Quite significantly, the tribunals which have approved the state trial court's use of the two confessions at issue

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[12] Judge Clark's comment is particularly appropriate in view of respondent's objections earlier that Judge Smith had overruled "six basic or underlying facts found by the state trier" (Brief for Respondent in opposition dated June 3, 1958, p. 10). These "facts" were Nos. 96, 99, 97, 100, 101 and 106 (R. 316, 317). A few moments' perusal of those "facts" will make it clear that Nos. 99, 97 and 106 are primarily inferences rather than "basic or underlying facts," and No. 96 and the first portion of No. 100 were not overruled (R. 176, 195). Only the finding on the request for counsel was rejected by Judge Smith. Judge Smith recognized this when, after comparing the state court finding on the counsel point with his own, he wrote: "In that respect the subordinate findings differ" (R. 433).

here—the District Court on remand, the Court of Appeals on the second appeal and the Connecticut Supreme Court of Errors on direct review of the murder conviction—have all considered themselves bound to the defective state court "findings." And the Supreme Court of Errors—without a single reference to any of this Court's long line of cases concerning the use of challenged confessions—adopted a standard in patent conflict with this Court's due process criteria. In an opinion by Chief Justice Wynne, the Connecticut Court held:

> "The question [of admissibility] is whether . . . that conduct induced the defendant to *confess falsely* that he had committed the crime being investigated. . . . There is nothing . . . to demonstrate that he was thereby forced to make an *untrue* statement . . . the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence *untrue* statement" (R. 222, 223). (Emphasis added.)

Yet only last term, this Court reiterated that it is "established that the Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false.'" *Blackburn* v. *Alabama, supra,* 361 U.S. at 206.

Measuring the totality of the circumstances—which are uncontroverted on the state record—surrounding the exaction of the two incriminating statements against the criteria established by this Court in a long line of cases commencing with *Brown* v. *Mississippi,* 297 U.S. 278 (1936), the use of the two confessions here is inconsistent with the Fourteenth Amendment under "traditional principles." *Spano* v. *New York,* 360 U.S. 315, 320 (1959).

A. As to the Illegal Removal From the Jail.

Petitioner, at the time of his lengthy interrogation of January 30, 1954 was confined by court order to the county jail until "discharged by order of law" (Pet. Ex. B, R. 486, 6). In contravention of that order and Connecticut law, §54-15 (Conn. Gen. Stat., 1958 Rev.), petitioner was illegally removed by virtue of a letter from the State's Attorney's office (Pet. Ex. C, R. 266, 10). The state trial judge, to be sure, found no illegality in this removal, but the Supreme Court of Errors noted that "proper court authorization should have been secured before the defendant was removed from jail" and termed the removal "illegal" (R. 223).

The majority below argues that this illegality could not have affected the voluntariness of petitioner's confession because he was unaware of it (R. 463). This court has, however, consistently considered illegal detention as a relevant circumstance of coercion without regard to whether or not the suspect was aware of the illegality. *Turner* v. *Pennsylvania*, 338 U.S. 62, 64, 66, 67 (1949); *Ward* v. *Texas*, 316 U.S. 547, 552, 553, 555 (1942); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152 (1944); *Malinski* v. *New York*, 324 U.S. 401, 412, 417 (1945) (separate opinion of Frankfurter, *J.*).

Moreover, the position of the majority below ignores the "complex of values" which "underlies the stricture against use by the state" of involuntary confessions:

> "But neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, 'The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforc-

ing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' Spano v. New York, supra (360 US at 320, 321)." *Blackburn* v. *Alabama*, 361 U.S. at 207.

It is this consideration which prompted Justice O'Sullivan, in dissenting in the Supreme Court of Errors, to note: "Those who become suspect do not thereby become the chattels, so to speak, of the investigators" (R. 229).

B. As to the Lack of Warning.

Ignoring the well-established principle that failure to warn an accused of his rights is a consideration in determining the coerced nature of confessions, *Haley* v. *Ohio*, 332 U.S. 596, 601 (1948), the court below likewise ignored this significant testimony of Chief Eagan at the state trial:

"Q. Did you tell him that he was entitled to the advice of an attorney? (Tr. p. 454)

"Mr. Ullman: Object to that, if your honor please. I know of no such rule.

"Mr. Corse: Did your honor rule? I didn't hear.

"The Court: Well, I will allow it to be answered. I will overrule the objection.

"The Witness: Ask the question.

"(Question read.)

"The Witness: I did not.

"Q. Did you tell him that anything he said would be used against him? A. I did not.

"Q. Did you tell him that he didn't have to say anything to you? A. No, sir, I did not.

"Q. In your direct examination, answering Mr. Ullman's questions regarding—preliminary to the state-

ment, you were speaking only of the period between eight and ten-twenty? A. That's right, sir.

"Q. You don't know what somebody else might have said to him before that time? A. I do not" (R. 237).

C. As to Prolonged Questioning.

The interrogation period—during which petitioner was questioned by police officers in relays—lasted over nine hours before he gave in and confessed at about 10:30 (R. 240, 242). In *Haley* v. *Ohio, supra,* this Court held a confession, produced after only five hours of interrogation where an uneducated Negro accused was without benefit of counsel and unwarned of his rights, was not voluntary. Only the age of the accused in the *Haley* case made the circumstances there less in accord with the dictates of due process.

And more recently in the *Spano* and *Blackburn* cases, where the accused were adults, this Court has held an interrogation of eight hours, in connection with other circumstances, to be productive of coerced confessions.

D. As to the Threat by Chief Eagan.

Petitioner's wife—the court below noted in an attempt to minimize Chief Eagan's threat—was a legitimate subject of police inquiry (R. 464). Yet neither the court below nor the State at any time has transposed that "legitimate" inquiry into a legitimate *purpose.* This they are unable to do because of Chief Eagan's frank admission that he faked the call to have petitioner's ailing wife and foster children brought into custody (R. 234)—after telling petitioner he would be "less than half a man" if he permitted his arthritic wife (R. 245) to be brought down (R. 202)—for the purpose of impressing petitioner with the advisability of giving the statement he sought (R. 200, 234). If

legitimate inquiry were his purpose, there would be no need or justification for a fake call to Mrs. Rogers.

That threats as to conduct to be employed against other persons can be considered in determining whether the accused has been denied due process is clear from *Harris* v. *South Carolina*, 338 U.S. 68 (1948). In *Harris*, after detailing the extensive interrogation which the police conducted against the accused, this Court in invalidating the confession in issue, noted:

> "Petitioner continued to deny implication in the killings. The sheriff then threatened to arrest petitioner's mother for handling stolen property. Petitioner replied, 'Don't get my mother mixed up in it and I will tell you the truth.' Petitioner then stated in substance what appears in the confession introduced at the trial. The session ended at midnight." 338 U.S. at 70.

And in the recent *Spano* case, the petitioner's concern, falsely aroused, for the livelihood of a friend on the police force, was an instrumental factor in this Court's invalidating a subsequent confession. In *Spano*, unlike here, the petitioner had had consultation and advice from his attorney.

E. In Combination, Both of Petitioner's Statements Were Involuntary Under Traditional Principles.

The state trial judge, months after the trial, made a "finding" contrary to petitioner's uncontradicted testimony in the state trial court. Such a finding, as argued elsewhere in this brief, cannot, the petitioner maintains, foreclose this Court from consideration of petitioner's uncontroverted testimony in the record. Petitioner's undisputed testimony, then, that he asked to see his counsel during the early portion of the interrogation is properly an element affecting the character of the confessions. *Haley* v. *Ohio*, *supra*, 332

U.S. at 600; *Fikes* v. *Alabama*, 352 U.S. 191, 197 (1957). However, if petitioner's testimony that he requested counsel is disregarded, the combined pressures, all apparent from the state court transcript, add up to a coercive pattern, as Judge Clark so aptly summarized:

> "Note that whether or not relator made the request to see his counsel, it is clear that the police took no steps to remind him of his right to counsel or put him in touch with his lawyer [R. 237], although they knew he had a lawyer and who the lawyer was [R. 241, 484]. It is also admitted that the next day when relator was before the coroner his lawyer was specifically refused access to him [R. 254, 114]. The pattern is clear, too, of a steady grilling [R. 242] while he was handcuffed to a chair [R. 241]; and when he did not break down, Chief Eagan was called in [R. 203], who employed the ruse of pretending to send for his crippled wife, with the final compulsory admonition that he would be 'less than half a man' [R. 202, 242] if he forced them to take his wife and children into custody. Surely by then he had to realize that he had only a dim future unless he confessed" (R. 474, 475).[13]

And the second statement given the next day to the coroner is likewise invalid. The coroner testified that "I left instructions that he wasn't to see anybody; that he was to be held incommunicado until I lifted that order" (R. 254).[14]

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[13] The bracketed record references added to Judge Clark's opinion are all to testimony in the state record.

[14] For justification for issuing his incommunicado order, the coroner relies on §6-70 (Conn. Gen. Stat., 1958 Rev.) which authorizes him to keep witnesses "separate so they cannot communicate with one another." Pursuant to these instructions, petitioner's privately retained counsel was prohibited from consulting with petitioner at the jail on January 31, 1954 (R. 318).

Made only fourteen hours after petitioner was returned to the jail from the State's Attorney's Office (while he was in illegal custody) and to an official who admitted that the impetus for his interrogation came from his knowledge of the previous statement to the police (R. 250, 318), the second incriminating statement must fall with the tainted first incriminating statement. "All were simply parts of one continuous process." *Lyra* v. *Denno*, 347 U.S. 556, 561 (1954).

As pointed out by Mr. Justice Murphy, "Subsequent confessions should automatically be invalid unless there is proof beyond all reasonable doubt that such an atmosphere has been dispelled and the accused has completely regained his free individual will." *Malinski* v. *N.Y.*, 324 U.S. 401, 433 (1945).

III. The State's Denial of Effective Consultation With Counsel Was, in Itself, a Fatal Lack of Due Process and Is a Ground Upon Which This Court Should Reverse the Court Below and Order the Writ to Issue.

Throughout these proceedings, petitioner has maintained —as a separate, due process objection to his state court conviction—that in denying him an opportunity for consultation with his privately-retained lawyer at two significant stages in the proceedings, the State abridged his right to counsel in violation of the Fourteenth Amendment's requirement of due process of law.

Five justices of this Court have now determined that the unconstitutional absence of counsel in itself renders resulting confessions inadmissible under the Fourteenth Amendment even though they might otherwise be voluntary under traditional principles. To be sure, a majority of this court in the recent case of *Crooker* v. *California*, 357 U.S. 433, 439 (1958), left unanswered the question of whether or not

a confession found to have been otherwise voluntarily given under the coerced confession doctrine must be excluded on the ground that it was made during a period of an unconstitutional denial of counsel. The majority in *Crooker* did not need to face this question because it held there had been no denial of counsel. But the four justices who dissented in the *Crooker* case indicated that the denial of counsel in itself vitiated the resulting confession. 357 U.S. at 441-448. And, more recently, in *Spano* v. *New York*, 360 U.S. 315, 324-327 (1959), Mr. Justice Stewart—concurring with Mr. Justice Douglas and Mr. Justice Brennan while a majority excluded the confessions under traditional principles—noted that an unconstitutional denial of counsel renders the resulting confession inadmissible. The denial of counsel in the case at bar, then, furnishes an additional basis for this Court to remand to the District Court with instructions to grant petitioner's writ of habeas corpus.

Even if this Court should fail to emancipate the District Court from the binding effect of the state trial court's "findings of fact," the writ of habeas corpus should issue on the basis of a denial of the right to counsel. Petitioner concedes that if the constitutional determination must be made *exclusively* on the state court's "findings," without reference to the state trial transcript or evidence taken at the August 31, 1956 hearing (R. 4-73), then the denial of counsel at the State's Attorney's office cannot be considered. But the state trial court specifically found that on the day following the interrogation at the State's Attorney's office, petitioner's own counsel sought and was denied permission to consult with him at the county jail. The state court finding in this regard was:

> "114. About noon on that day Attorney Chester T. Corse, an office associate of Attorney Robinson, asked the Sheriff for permission to see the accused and was

informed by the Sheriff that the accused was being held incommunicado on the Coroner's order" (R. 318).

Therefore, if petitioner's position on the duty of the District Court to reject the state court's defective "findings" is sustained, this right to counsel argument involves two denials of the right to consultation with counsel. If, on the other hand, the courts below were not in error in limiting Judge Smith's scope of review, there still stands on the state record—as a "finding," which in this instance is fully supported by the testimony—the undisputed fact that on the second day petitioner's attorney was not allowed to consult with his client at the jail. Regardless of how this Court rules on the issues of the District Court's right to hold a hearing and its duty to determine underlying facts anew, the issue of the denial of the right to counsel at the jail is, therefore, before the Court.

Under the minimal standards prescribed by this Court in state capital cases, it is clear that once "charges are made in a criminal proceeding, he [the accused] may demand the presence of his counsel for his defense." *In re Groban's Petition*, 352 U.S. 330, 333 (1957).

Here, Harold D. Rogers—like Vincent Joseph Spano, but unlike John Russell Crooker, Vincent Cicenia, and Harry and Nathan Groban—had formal criminal charges lodged against him when the State denied him access to counsel. On January 13, 1954, on the basis of a criminal complaint filed against him on the unrelated attempted robbery charges, petitioner had been adjudged probably guilty of a grave crime (R. 176; Pet. Ex. B, R. 485, 6). Furthermore, at the time that he was questioned, petitioner was not held prisoner by the police merely for investigatory purposes. He had been committed to the county jail to insure his appearance at his future trial and he was officially

a prisoner of the Superior Court, the state's court of general criminal jurisdiction (Pet. Ex. B, R. 486, 6). True, the crimes for which he was being held by virtue of the January 13, 1954 bindover proceeding were not related to the crime for which the State now seeks his life. However, it was not until March 2, 1954 that petitioner was indicted by a grand jury (R. 171) for murder. If the absolute right to counsel ordained in this Court's recent decisions is not applicable in the case at bar, the police officers and the coroner would be at liberty to prevent, for a period in excess of two months, consultation with the lawyer petitioner had hired to represent him. Quite significantly, since the State had petitioner in custody on the attempted robbery charges it acted without haste in pressing formal murder charges against him. If the State can avoid its constitutional obligation in this fashion, it could, indeed, go far toward placing "the liberty of every man in the hands of every petty officer." *In re Oliver*, 333 U.S. 257, 273 (1948).

Once the attempted robbery charges, then, were made against petitioner his constitutional right to consult his own attorney became operative, irrespective of the amount of prejudice resulting from the denial, and petitioner was within the protection of this Court's unanimous declaration in *Chandler* v. *Fretag*, 348 U.S. 3, 9, 10 (1954):

> "Regardless of whether petitioner would have been entitled to appointment of counsel, his right to be heard from his own counsel was unqualified . . . A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel."

That there need be no specific showing of prejudice from the denial is clear from *Glasser* v. *U.S.*, 315 U.S. 60, 76 (1942), where this Court pointed out:

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

To be sure, the *Glasser* case involved a federal prosecution. But in a state court capital case—as opposed to non-capital cases—the Fourteenth Amendment right to counsel, once criminal charges have been made, is coextensive with the Sixth Amendment right to counsel afforded defendants in federal criminal prosecutions. *Tompkins* v. *Missouri*, 323 U.S. 485, 487 (1945); *Williams* v. *Kaiser*, 323 U.S. 471, 475 (1945). In *Kaiser*, this Court recognized that the *Glasser* rule applies to review of state court capital cases.

Petitioner is not asserting that the State must allow consultation under all circumstances. It is conceded that the State can take reasonable precautions to safeguard its prisoners or to provide for the orderly operation of its jail, and that the State could not be forced to go to unreasonable efforts to determine the identity of the accused's lawyer or his whereabouts. But the two crucial interferences by the State in the case at bar were clearly unreasonable. Two of the police officers who interrogated petitioner at the State's Attorney's office admitted that they knew whom petitioner had retained as counsel (R. 45, 48, 60). One of these had even been present in the city court when petitioner was represented by his counsel at an earlier hearing on the attempted robbery charges (R. 60). The sheriff testified that the attempted attorney-client consultation by petitioner's counsel would not have disturbed the jail discipline (R. 18). And the deputy jailer, keeper of the jail at the time of the attempted consultation, testified that it was the coroner's incommunicado order that pre-

vented petitioner from consulting with his private counsel at the jail (R. 11, 13).

However, even if the less stringent right to counsel standards—applicable to noncapital cases, *Betts* v. *Brady*, 316 U.S. 455 (1942), and capital cases where there is at issue only the right to counsel prior to the time the State charges a crime, *Crooker* v. *California*, 357 U.S. 433 (1958), and *Cicenia* v. *LaGay*, 357 U.S. 504 (1958)—are applicable here, petitioner suffered a denial of due process. The circumstances of the case at bar emphasize that at the most critical period of the proceedings against petitioner—at, and immediately prior to, two interrogations during which two alleged confessions were exacted and at times when consultation was vitally important—petitioner was denied the aid of his own attorney. The action of the State resulted in petitioner being without counsel from the very instant he knew he was a suspect in a murder case until he had twice confessed to a crime for which the state seeks to electrocute him.

It should be emphasized that petitioner is not a college graduate with a law school training in criminal law as was the accused in the *Crooker* case. Mr. Justice Clark, in applying the less stringent standard of the *Crooker* case attached great import to that fact:

> "... the sum total of the circumstances here during the time petitioner was without counsel is a voluntary confession by a college-educated man with law school training who knew of his right to keep silent." 357 U.S. at 440.

In both *Crooker* and *Cicenia*, this Court expressed "strong distaste" over the denial of counsel, but felt its objections could not be elevated to the level of constitutional infirmities since the denials there at issue occurred prior to the

time the accused were charged with crimes. One of the crucial reasons for this Court's refusal to adopt the stricter, "unqualified" counsel standards was its concern for the effect the absolute right to consult might have on normal police interrogation. This is made clear in the *Cicenia* case by Mr. Justice Harlan's reliance, 357 U.S. at 509, on the concurring opinion of Mr. Justice Jackson in *Watts* v. *Indiana*, 338 U.S. 49, 57-62 (1949). To have held that the accused in the *Crooker* and *Cicenia* cases were entitled to counsel during the period police were interrogating them would "constrict" police investigation, this Court decided. However, in the case at bar, in one of the two instances when petitioner was denied counsel—at the jail on January 31, 1954—there was no investigation taking place. For petitioner's attorney attempted to consult his client at about noon (R. 318), approximately five hours before petitioner was removed from the jail for interrogation by the coroner (R. 248). In respect to one of the petitioner's two counsel claims, then, the basic policy consideration for which this Court restricted the right to counsel in *Cicenia* and *Crooker* is missing in the case at bar. This clearly tips the balance in petitioner's favor on his second claim of deprivation of counsel, even if the less stringent, pre-charge, *Crooker-Cicenia* doctrine is applied.

In this capital case involving the right to counsel after charges had been made, this Court need not concern itself about "nice calculations as to the amount of prejudice" arising from the State's denial of the consultation at the State's Attorney's office or at the jail. When the State blocked the two consultations between petitioner and his attorney, petitioner's "unqualified" right to counsel, under the *Chandler* doctrine, was destroyed, for he was not given every "reasonable opportunity to employ and *consult* with counsel," as the *Chandler* case commands. 348 U.S. at 9, 10. And even under the less stringent standard arguably ap-

plicable to the period prior to the filing of charges against an accused, there was a resulting unfairness to this little-educated petitioner which due process standards will not tolerate. Confessions exacted after such denials, five justices of this Court now believe, cannot, consistently with Fourteenth Amendments standards, be used in a criminal prosecution by which the State seeks to forfeit a human life. To rule otherwise in this case would only serve to dilute the firmly established, quarter-century old principle that an accused is entitled to "the guiding hand of counsel at every stage of the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932). From the time he knew he was a murder suspect until after the State had exacted two confessions—when consultation, preparation and thorough-going investigation were vitally important—petitioner, held incommunicado (R. 176), did not have every reasonable opportunity to consult counsel, although he was "as much entitled to such aid during that period as at the trial itself." *Powell* v. *Alabama, supra*, 287 U.S. at 57.

Conclusion

Under the limited scope of review prescribed by the court below, petitioner's life will be sacrificed despite the constitutional deprivation which former Chief Justice O'Sullivan of Connecticut, Chief Judge Smith of the District Court of the District of Connecticut and Judge Clark of the Second Circuit all recognize to exist. If this Court does not instruct the District Court to issue the writ, a crucial "finding" admittedly without evidentiary support will be the decisive factor in the taking of a human life.

Judge Smith's original conclusion—imputing unconstitutional action to state officials in a criminal case—was not a hastily conceived one. It was the first such finding in Judge

Smith's 17 years as a distinguished federal judge. The endorsement of Judge Smith's original conclusion—by Judge Clark—who has expressed repeated reluctance to overturn state court convictions—emphasizes the gravity of the constitutional deprivation at issue here.

It is respectfully submitted, therefore, that the judgment of the Court of Appeals be reversed and that this cause be remanded to the District Court with instructions to issue the requested writ of habeas corpus invalidating the two incriminating statements, petitioner's conviction for murder and the resulting death sentence so that petitioner is not deprived of his life without due process of law.

Respectfully submitted,

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August 25, 1960

Appendix A

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
SIXTH	
HEARING ON ADMISSIBILITY OF EXHIBIT VV	HEARING ON ADMISSIBILITY OF EXHIBIT VV
The State through Assistant Chief of Police Raymond Eagan sought to offer in evidence the statement made by the accused on the night of January 30, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.	The State through Assistant Chief of Police Raymond Eagan sought to offer in evidence the statement made by the accused on the night of January 30, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.
On the evidence adduced on this issue the following facts were proven:	On the evidence adduced on this issue the following facts were proven:
71. On Saturday, November 21, 1953, the body of Mrs. Dorothy Kennedy was found in the West Shore Package Store under circumstances indicating that she had died from bullet wounds during the course of a robbery committed by a person unknown.	1. On Saturday, November 21, 1953, the body of Mrs. Dorothy Kennedy was found in the West Shore Package Store under circumstances indicating that she had died from bullet wounds during the course of a robbery committed by a person unknown.
72. Thereafter investigations into this crime were conducted by the West Haven Police and other prosecuting authorities to no avail.	2. Thereafter investigations into this crime were conducted by the West Haven Police and other prosecuting authorities to no avail.
73. On the evening of January 9, 1954, the New Haven Police arrested the accused on charges of crime committed that day at the Travelers Hotel in New Haven.	3. On the evening of January 9, 1954, the New Haven Police arrested the accused on charges of crime committed that day at the Travelers Hotel in New Haven.
74. At the time of his arrest the accused had in his possession a loaded 38 calibre Smith & Wesson revolver.	4. At the time of his arrest the accused had in his possession a loaded 38 calibre Smith & Wesson revolver.

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney.*
75. The accused was questioned by police that evening and claimed he had won the gun in a "crap game" that day.	5. The accused was questioned by police that evening and claimed he had won the gun in a "crap game" that day.
76. On being questioned further on the following day the accused admitted having stolen the gun from the home of his nephew George Evans.	6. On being questioned further on the following day the accused admitted having stolen the gun from the home of his nephew George Evans.
77. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.	7. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.
78. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.	8. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.
79. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.	9. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.
80. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.	10. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
81. Thereupon a letter from the State's Attorney's Office was delivered to the Jailer requesting him to permit police officers to take the accused to the State's Attorney's Office for questioning.	11. Thereupon a letter from the State's Attorney's Office was delivered to the Jailer requesting him to permit police officers to take the accused to the State's Attorney's Office for questioning.
82. In compliance with this request, the accused was presented at the State's Attorney's Office shortly after noon.	12. In compliance with this request, the accused was presented at the State's Attorney's Office shortly after noon.
83. During his first hour at the State's Attorney's Office the accused was not questioned at all.	13. During his first hour at the State's Attorney's Office the accused was not questioned at all.
84. Thereafter on questioning by the officers he denied knowledge of or implication in the murder of Mrs. Kennedy.	14. Thereafter on questioning by the officers he denied knowledge of or implication in the murder of Mrs. Kennedy.
85. During this questioning and at all times while at the State's Attorney's Office the accused was seated in an armchair, his handcuffs released so that the cuffs were attached to only one wrist and his hands and arms free.	15. During this questioning and at all times while at the State's Attorney's Office the accused was seated in an armchair, his handcuffs released so that the cuffs were attached to only one wrist and his hands and arms free.
86. The accused was permitted to smoke cigarettes and did smoke during the afternoon and evening, some of the cigarettes being furnished by police officers in attendance.	16. The accused was permitted to smoke cigarettes and did smoke during the afternoon and evening, some of the cigarettes being furnished by police officers in attendance.
87. At about 4 o'clock in the afternoon he was given a sandwich and coffee which he consumed.	17. At about 4 o'clock in the afternoon he was given a sandwich and coffee which he consumed.
88. In response to a telephone call Assistant Police Chief Eagan arrived at the State's Attorney's Office about 8 p.m. and	18. In response to a telephone call Assistant Police Chief Eagan arrived at the State's Attorney's Office about 8 P.M. and

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
thereupon proceeded to question the accused further.	thereupon proceeded to question the accused further.
89. The accused persisted in his denials and during the course of the questioning Chief Eagan informed the accused he was intending to send for the accused's wife in order to question her as to any knowledge she might have of the affair.	19. The accused persisted in his denials and during the course of the questioning Chief Eagan informed the accused he was intending to send for the accused's wife in order to question her as to any knowledge she might have of the affair.
90. Chief Eagan then pretended to put through a telephone call to Police Headquarters stating, in the hearing of the accused, that he would call the officers later with respect to sending for Mrs. Rogers.	20. Chief Eagan then pretended to put through a telephone call to Police Headquarters stating, in the hearing of the accused, that he would call the officers later with respect to sending for Mrs. Rogers.
91. During the hour following this fictitious call Chief Eagan questioned the accused further and also asked him if he wanted anything to eat and the accused requested coffee.	21. During the hour following this fictitious call Chief Eagan questioned the accused further and also asked him if he wanted anything to eat and the accused requested coffee.
92. Chief Eagan then indicated he was ready to call the officers again to instruct them to bring Mrs. Rogers to the State's Attorney's Office whereupon the accused announced his readiness to make a statement.	22. Chief Eagan then indicated he was ready to call the officers again to instruct them to bring Mrs. Rogers to the State's Attorney's Office whereupon the accused announced his readiness to make a statement.
93. After a few brief admissions by the accused, one of the Official Court Reporters was summoned and a stenographic record was made of the statements made by the accused in response to questions by Chief Eagan, which statement is Exhibit VV.	23. After a few brief admissions by the accused, one of the Official Court Reporters was summoned and a stenographic record was made of the statements made by the accused in response to questions by Chief Eagan, which statement is Exhibit VV.
94. At the conclusion of the statement the accused signed the stenographic notes.	24. At the conclusion of the statement the accused signed the stenographic notes.

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
95. Although the statement started about 10:40 p.m. and ended about midnight there were interruptions for coffee, cigarettes and short recesses.	25. Although the statement started about 10:30 P.M. and ended about midnight there were interruptions for coffee, cigarettes and short recesses.
96. At no time was the accused subjected to continuous or extended questioning.	26. At no time was the accused subjected to continuous or extended questioning.
97. No force, threats or inducements were made or offered to the accused at any time.	27. No force, threats or inducements were made or offered to the accused at any time.
98. The accused acknowledged at the trial that he was not abused and made no complaint at any time of his treatment by the police.	28. The accused acknowledged at the trial that he was not abused and made no complaint at any time of his treatment by the police.
99. The treatment of the accused by the investigators was at all times considerate.	29. The treatment of the accused by the investigators was at all times considerate.
100. The accused had experienced previous arrests and interrogations by the police and the treatment accorded him on this occasion did not adversely affect him.	30. The accused had experienced previous arrests and interrogations by the police and the treatment accorded him on this occasion did not adversely affect him.
101. The accused did not at any time on the day of the questioning request the presence or assistance of an attorney.	31. The accused did not at any time on the day of the questioning request the presence or assistance of an attorney.
102. The accused answered the questions put to him directly and unhesitatingly.	32. The accused answered the questions put to him directly and unhesitatingly.
103. The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth.	33. The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth.
104. Neither at the trial or in his Claims of Proof on this Appeal did the accused make	34. Neither at the trial or in his Claims of Proof on this Appeal did the accused make any

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
any claim that his statement admitting the shooting of Mrs. Kennedy was untrue.	claim that his statement admitting the shooting of Mrs. Kennedy was untrue.
105. The delivery of the accused to the State's Attorney's Office and his presence there on January 30th were not unlawful.	35. The delivery of the accused to the State's Attorney's Office and his presence there on January 30th were not unlawful.
106. If there was any element of irregularity or illegality in his presence at the State's Attorney's Office on that date, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession.	36. If there was any element of irregularity or illegality in his presence at the State's Attorney's Office on that date, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession.
107. The statement made by the accused to the police on this date was freely and voluntarily made and accordingly was admissible in evidence.	37. The statement made by the accused to the police on this date was freely and voluntarily made and accordingly was admissible in evidence.
SEVENTH	
HEARING ON ADMISSIBILITY OF EXHIBIT WW	HEARING ON ADMISSIBILITY OF EXHIBIT WW
The State through Coroner James J. Corrigan sought to offer in evidence a statement made by the accused at the Inquest conducted by the Coroner on January 31, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.	The State through Coroner James J. Corrigan sought to offer in evidence a statement made by the accused at the Inquest conducted by the Coroner on January 31, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.
On the evidence adduced on this issue, the following facts were proven:	On the evidence adduced on this issue, the following facts were proven:

"Findings" of the State Trial Court

108. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.

109. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.

110. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.

111. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from the ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

112. During the morning of January 31, 1954, James J. Corrigan, Coroner for New Haven County, was informed that the accused had on the preceding evening confessed to the police his murder of Mrs. Kennedy, and the Coroner thereupon instructed that he was issuing a

Suggested "Findings" Submitted by the State's Attorney

1. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.

2. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.

3. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.

4. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

5. During the morning of January 31, 1954, James J. Corrigan, Coroner for New Haven County, was informed that the accused had on the preceding evening confessed to the police his murder of Mrs. Kennedy, and the Coroner thereupon instructed the Sheriff that he was

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
warrant to hold the accused incommunicado at the County Jail.	issuing a warrant to hold the accused incommunicado at the County Jail.
113. During that morning Coroner Corrigan was for several hours engaged in the investigation of a gas explosion that caused several deaths that day.	6. During that morning Coroner Corrigan was for several hours engaged in the investigation of a gas explosion that caused several deaths that day.
114. About noon on that day Attorney Chester T. Corse, an office associate of Attorney Robinson, asked the Sheriff for permission to see the accused and was informed by the Sheriff that the accused was being held incommunicado on the Coroner's order.	7. About noon on that day Attorney Chester T. Corse, an office associate of Attorney Robinson, asked the Sheriff for permission to see the accused and was informed by the Sheriff that the accused was being held incommunicado on the Coroner's order.
115. Shortly afterwards, the Coroner's warrant was delivered to the Sheriff at the Jail directing him to hold the accused at the County Jail pending further orders from the Coroner.	8. Shortly afterwards the Coroner's warrant was delivered to the Sheriff at the Jail directing him to hold the accused at the County Jail pending further orders from the Coroner.
116. In the late afternoon of that day the Coroner telephoned the Sheriff and asked that the accused be brought to the Coroner's Office for questioning.	9. In the late afternoon of that day the Coroner telephoned the Sheriff and asked that the accused be brought to the Coroner's Office for questioning.
117. Thereupon the Sheriff delivered the accused to the Coroner's Office and the Coroner administered to the accused the usual oath.	10. Thereupon the Sheriff delivered the accused to the Coroner's Office and the Coroner administered to the accused the usual oath.
118. Before proceeding to interrogate the accused, the Coroner cautioned him as to his constitutional rights, informing him that he was under no duty to answer questions and that he had the right to refuse to give testimony and that any testimony he might give might be used against him.	11. Before proceeding to interrogate the accused, the Coroner cautioned him as to his constitutional rights, informing him that he was under no duty to answer questions and that he had the right to refuse to give testimony and that any testimony he might give might be used against him.

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
119. The accused was further told by the Coroner that he had the right to be represented by counsel if he wished.	12. The accused was further told by the Coroner that he had the right to be represented by counsel if he wished.
120. The accused after hearing the cautionary remarks of the Coroner, stated that he understood his rights and averred his willingness to testify.	13. The accused after hearing the cautionary remarks of the Coroner, stated that he understood his rights and averred his willingness to testify.
121. No threats of harm or promises of reward were made by the Coroner to the accused.	14. No threats of harm or promises of reward were made by the Coroner to the accused.
122. The accused understood the language used by the Coroner and the rights afforded to him under the Constitution of the United States and the laws of this State.	15. The accused understood the language used by the Coroner and the rights afforded to him under the Constitution of the United States and the laws of this State.
123. The accused is highly intelligent and fully comprehended the statements made to him by the Coroner.	16. The accused is highly intelligent and fully comprehended the statements made to him by the Coroner.
124. The accused was the brother of a police officer and had experienced previous arrests and interrogations by the Police.	17. The accused was the brother of a police officer and had experienced previous arrests and interrogations by the Police.
125. The accused did not ask to be represented by counsel.	18. The accused did not ask to be represented by counsel.
126. The accused voluntarily chose to testify after hearing from the Coroner that he was entitled to counsel and that anything he said might be used against him.	19. The accused voluntarily chose to testify after hearing from the Coroner that he was entitled to counsel and that anything he said might be used against him.
127. The accused answered the questions calmly and voluntarily.	20. The accused answered the questions calmly and voluntarily.
128. The questioning by the Coroner lasted about an hour and one-half and thereupon the	21. The questioning by the Coroner lasted about an hour and one-half and thereupon the

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
accused was returned by the Sheriff to the County Jail and his incommunicado status was released the following day.	accused was returned by the Sheriff to the County Jail and his incommunicado status was released the following day.
129. The delivery of the accused to the Coroner's Office and his presence there for questioning were not unlawful.	22. The delivery of the accused to the Coroner's Office and his presence there for questioning were not unlawful.
130. If there was any element of irregularity or illegality in his presence at the Coroner's Office on that day, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession to the Coroner.	23. If there was any element of irregularity or illegality in his presence at the Coroner's Office on that day, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession to the Coroner.
131. The statement made by the accused to the Coroner was substantially the same as that made by him the previous evening to the Police.	24. The statement made by the accused to the Coroner was substantially the same as that made by him the previous evening to the Police.
132. The statement of the accused was freely and voluntarily made and accordingly was admissible in evidence.	25. The statement of the accused was freely and voluntarily made and accordingly was admissible in evidence.

"Findings" of the State Trial Court

(The above "findings" are set forth in the state court record on appeal (R. 314-320) and are set forth as an appendix to the majority opinion in the court below (R. 465-472).)

Suggested "Findings" Submitted by the State's Attorney

STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOR COURT

I, Edward Horwitz, clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing seven pages are true copies of pages 5 through 11 of the Counterfinding totaling fourteen pages filed on behalf of the State of Connecticut on September 9th, 1954 by Abraham S. Ullman, State's Attorney, in the case of State of Connecticut vs. Harold D. Rogers, #9995, all as on file in the records of this Court.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 4th day of November, 1959.

[SEAL]

ss. Edward Horwitz Clerk.

Appendix B

STATUTES INVOLVED

28 USC (1952)

§2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

• • •

(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • •

(3) He is in custody in violation of the Constitution or laws or treaties of the United States: or

• • •

(5) It is necessary to bring him into court to testify or for trial.

§2242. Application.

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held. (June 25, 1948, ch. 646, 62 Stat. 965.)

§2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

* * *

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. (June 25, 1948, ch. 646, 62 Stat. 965.)

§2245. Certificate of trial judge admissible in evidence.

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place. (June 25, 1948, ch. 646, 62 Stat. 966.)

§2246. Evidence; depositions; affidavits.

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discre-

tion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits. (June 25, 1948, ch. 646, 62 Stat. 966.)

§2247. Documentary evidence.

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence. (June 25, 1948, ch. 646, 62 Stat. 966.)

Conn. Gen. Stat. (1958)

§6-70. Power of coroner in securing evidence.

For the purpose of securing evidence, the coroner may enter any and all places in his county and shall have power to issue a warrant for a jury inquest, to compel the attendance and testimony of witnesses by subpoena and capias issued by him or other proper authority and to punish for contempt to the same extent as trial justices may in criminal cases. He may order and cause witnesses to be kept separate so that they cannot communicate with one another until they have testified. He may order or cause any person or persons whom he has good reason to suspect of having criminally caused the death in regard to which he is holding an inquest to be arrested and committed to the county jail or other proper place. He shall have power to take bail in such cases or to commit without bail when in his opinion the person arrested is guilty of a capital offense and when the proof against such person is evident or the presumption great. When bail is taken, it shall be to the state and shall be conditioned for the appearance of the person so arrested before the superior court for such county at its next criminal session. Any person so arrested and admitted to bail may be rearrested and committed by the coroner without bail when, in the opinion of the coroner, the proof is

evident or the presumption great that such person is guilty of a capital offense. In no case shall any person be kept under arrest by an order from a coroner for a longer time than twenty-four hours after the finding of a verdict by the jury or after the finding by the coroner in such inquest, and, at any time before such finding, whenever the grounds on which a person is so arrested cease to exist in the opinion of the coroner, he shall order the release of such arrested person. (1949 Rev., S. 485.)

§54-15. Binding over on probable cause.

When any complaint for any criminal matter cognizable by the superior court is legally brought before a trial justice, he may inquire into the facts relating thereto; and, if he finds that probable ground exists for its support, he may, if the offense is bailable, order the accused to enter into a recognizance with surety to the state, conditioned that he shall appear before the criminal term of the superior court next to be held in the county where such bond is taken, to answer to the complaint and abide the order or judgment of said court thereon; and, on his failure to enter into such recognizance, or if the offense complained of is not bailable, such trial justice shall order him to be committed to the jail in such county until the next criminal term of said court or until he is discharged by due course of law; but all cases of binding over by trial justices, or by any city, borough, police or town court, in the county of New Haven, within the judicial district of Waterbury, shall be to the criminal term of the superior court next to be held at Waterbury; and all cases of binding over in New Haven county outside of said judicial district shall be to the criminal term of the superior court next to be held at New Haven. (1949 Rev., S. 8727; November, 1955, S. N230.)

LE COPY

In forma pauperis
Petition not printed

Office-Supreme Court, U.S.
FILED
OCT 3 1960
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

No. 40

HAROLD D. ROGERS
Petitioner

vs.

MARK S. RICHMOND, WARDEN
Respondent

On Writ of Certiorari To The United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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In the

Supreme Court of the United States

No. 40

HAROLD D. ROGERS
Petitioner

vs.

MARK S. RICHMOND, WARDEN
Respondent

BRIEF FOR RESPONDENT

OPINIONS BELOW

The citations of opinions of the lower courts are adequately set forth in Petitioner's Brief, page 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief, page 2.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in sustaining the standard of review on habeas corpus applied by Judge SMITH in his decision on remand?

2. Did the Court of Appeals err in holding that the facts and circumstances surrounding petitioner's confessions were not such as to render them involuntary and inadmissible at his trial?

STATEMENT OF THE CASE

On the evening of November 21, 1953, Dorothy Kennedy was shot and killed by petitioner Harold Rogers in her husband's liquor store. Earlier that day petitioner stole a revolver and cartridges from the home of his nephew. (R. 285) On entering the store, he asked for a half-pint of liquor and thereupon produced his gun and announced his purpose to commit robbery. As decedent ran to the telephone, petitioner struck her on the head and fired five shots at her. He then removed the contents of the cash register and drove off. (R. 286)

On being questioned by his nephew, petitioner denied stealing the gun whereupon both men went to police headquarters and reported that it had been stolen by persons unknown. Thereafter petitioner filed off the serial numbers to conceal its identity. (R. 286).

On January 9, 1954, petitioner was arrested on charges of Carrying Revolver, Attempted Robbery, Breaking and Entering and Theft, committed that day at the Travelers Hotel. (R. 483) On being questioned he gave a signed statement claiming that he won the gun in a "crap game" that afternoon, but the following day admitted stealing it from his nephew's home. (R. 286)

On January 13, 1954, petitioner was presented in the City Court of New Haven on the Travelers Hotel charges and was bound over to the Superior Court and in default of bail was lodged in the county jail.

On the morning of January 30, 1954, ballistics tests conducted by the state police established that the bullets recovered from the Kennedy murder scene were fired by the gun found in petitioner's possession. Thereupon petitioner was brought to the office of the state's attorney for questioning. Detectives started to question him at about 2 P. M. (R. 195) and there were several intermissions and interruptions. At all times Rogers was seated in a comfortable armchair. (R. 42) He was invited to eat and

did eat and have coffee; and in the evening he was again invited to eat but chose merely to take coffee. (R. 34) He smoked his own cigarettes and those of the officers. When he first expressed a desire to smoke, one handcuff was released and thereafter one hand remained free. (R. 42)

Petitioner makes no claim that physical violence or threats of physical violence were used against him and acknowledges that at no time did the questioning by the police confuse him. (R. 33)

At 8 P. M. Captain Eagan of the New Haven Police Department, came in to question Rogers. Eagan who was acquainted with Rogers from a prior arrest, told him that he did not have to say anything (R. 28) and that he could not promise him any benefit or reward if he did say anything. (R. 385) During the interrogation, Eagan informed Rogers that Mrs. Rogers would have to be questioned in order to ascertain whether he had said anything to her about the murder and he assured Rogers that during her questioning the two state wards who were then living with them would be taken care of at the Children's Center. (R. 199, 316) At about 9 P. M. Eagan made a pretended call on a dead wire to hold a policewoman in readiness to bring Mrs. Rogers down for questioning. During the next hour Rogers was not questioned at all. (R. 243) At about 10:30 P. M. Rogers said he had been drinking that night (R. 200) and then proceeded to confess. Thereupon a court reporter was summoned and Rogers gave his confession while the reporter recorded it stenographically. (R. 325-346) The confession consisted of thirty typewritten pages. At the outset Rogers related, largely in narrative form (R. 325-326), an elaborately fabricated and detailed story of (1) a six months adulterous relationship between the decedent and himself; and (2) a claim of provocation for the murder based upon profane and abusive remarks by the decedent just before the shooting. Throughout his confession Rogers answered questions freely and without hesitancy. On its completion shortly after 12 P. M. Rogers made oath to its truth.

The next day some seventeen hours later, Rogers gave a second confession to the coroner at his official inquest. (R. 347-369) The coroner fully informed Rogers of his right to counsel and his right to remain silent and that anything he said might be used against him. (R. 347-348) Rogers acknowledged his awareness of his rights and expressly declined the services of counsel.

Rogers was forty-eight years old, highly intelligent, and the brother of a New Haven police officer. (R. 319) He had been arrested and interrogated by police on at least four occasions prior to the questioning on January 30th; the first time in connection with a New York offense, the second after his arrest for violation of parole, the third for a liquor offense in 1949 in New Haven, the fourth on his arrest on January 9th for the Travelers Hotel robbery. (R. 195-196)

STATE COURT PROCEEDINGS

The Grand Jury returned an indictment charging Rogers with murder in the first degree in the perpetration of a robbery. Rogers was represented by counsel at all stages of the proceedings.

During the course of his trial to the jury, petitioner invoked his right to the so-called "orthodox" rule for testing the admissibility of confessions. Accordingly, the court excused the jury and heard evidence at great length as to the circumstances surrounding his confession to the police. At this preliminary hearing, Rogers testified and called witnesses in his own behalf, and the court excluded questions concerning the truth or falsity of the confession. The trial judge made thirty-seven express findings of fact (R. 314-317), including the specific finding that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney." Upon the conclusion of this preliminary hearing and after arguments by counsel, the court ruled that the confession was freely and voluntarily made. After this finding of voluntariness by the court, the jury in the course of the trial considered the same facts, claims and circum-

stances surrounding the making of the confession in determining its weight and credibility. A similar hearing in the absence of the jury was had upon the second confession to the coroner. Upon testimony produced at this hearing, the court specifically found that (1) "the accused did not ask to be represented by counsel" and (2) "the accused voluntarily chose to testify after hearing from the coroner that he was entitled to counsel and that anything he said might be used against him". (R. 319) The court concluded that this second confession also was voluntary.

There was substantial evidence other than the confession connecting Rogers with the murder, notably the ballistics evidence, possession of the murder weapon on the night of the murder (R. 56), his false report to the police that the gun had been stolen by persons unknown (R. 286); his possession of the murder gun at the time of his arrest (R. 196), his contradictory statements, first claiming that he won the gun in a "crap game" and afterwards admitting that he had in fact stolen it on the day of the murder. (R. 285, 286) In defense, Rogers presented witnesses merely for the purpose of mitigating the penalty (R. 312), but offered no evidence to controvert the truth of his confession of this murder. (R. 317) The jury returned a verdict of guilty of murder in the first degree.

On appeal, the Supreme Court of Errors considered the circumstances surrounding the confessions and held that they were freely and voluntarily given and affirmed the conviction (R. 219) (O'SULLIVAN, J., dissenting). The ensuing petition for certiorari was denied by the Supreme Court of the United States.

FEDERAL PROCEEDINGS IN HABEAS CORPUS

Petitioner thereupon instituted this habeas corpus proceeding in the federal court below. Judge SMITH of the district court made no examination of the state record or of the factual findings therein contained (R. 388), but instead conducted a hearing *de novo* for the purpose of making his own findings of historical fact in the

erroneous belief that "On habeas corpus, the federal court *must* make its own determination of the underlying facts." (R. 178) (emphasis added) At that hearing Rogers testified that Captain Eagan had informed him that "I didn't have to say nothing to him" (R. 28); and three officers testified that Rogers had made no request for counsel at any time during his interrogation (R. 41, 58, 66), thereby reinforcing the record testimony of Captain Eagan. Judge SMITH disregarded petitioner's acknowledgement that he was told of his right to "say nothing" (R. 176), but on the issue of request for counsel he chose to believe petitioner and to repudiate the testimony of the four officers of the law (including Captain Eagan whom he had never seen) (R. 176) on the theory that the officers' recollection would naturally "coincide with the version they must subconsciously prefer." (R. 433). Judge SMITH thereupon ordered the sentence vacated. (R. 176-180)

On respondent's motion for rehearing and to amend the findings, Judge SMITH refused to receive or consider the state trial record or the factual findings of the trial judge on the admissibility of the confession and denied the motion for rehearing. (R. 194-196)

On appeal, the Court of Appeals vacated the judgment of the district court on the ground that Judge SMITH had failed "to call for and consider the trial record or so much thereof as related to the admissibility of the confessions" (R. 397); and on remand it directed that "Unless the judge below shall find in the record thus before him material which he deem to constitute 'vital flaws' and 'unusual circumstances' within the meaning of *Brown* vs. *Allen*, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the state trial court. *Brown* vs. *Allen*, at pages 507-8." (R. 398-399)

On petition for rehearing, the Court of Appeals pointed out that this limitation to the historical facts as found by the state court would not preclude the district court from hearing additional

"evidence material on the constitutional issue which the state court had excluded or as to which it had made no finding" (R. 419), even though no vital flaw is found in the state proceedin.

Petitioner's request to this Court for certiorari was denied per curiam with a short opinion. 357 U. S. 220. (R. 417)

On remand to the district court, the respondent moved to disqualify Judge SMITH which motion was denied. (R. 418)

The district court thereupon received the entire transcript of the state proceedings (Record on Appeal, 1043-1714), the findings made by the state trial court (R. 314-320), the transcript of the preliminary hearing on the issue of the voluntariness of the confessions (Record of Appeal, 967-1041), the state court appellate record (R. 278-324) and Rogers' two confessions. (R. 325-369)

With the complete record thus before him, Judge SMITH acknowledged that "the issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge" (R. 434) and that he could not find "any lack of fair hearing or procedural due process, or other basis for this court in its judicial discretion to consider evidence outside the state court record." (R. 432) Accordingly, he used the historical facts as found by the state court as the basis for his consideration of the constitutional issues and thereupon concluded that the writ should be discharged. (R. 435) Petitioner thereafter moved for additional findings, which motion was denied by Judge SMITH. (R. 446)

On appeal, the Court of Appeals affirmed, in an opinion by Judge MOORE in which Judge SWAN joined, with CLARK, C. J. dissenting. (R. 452) The court held that the procedure adopted by Judge SMITH on remand was in full accord with *Brown* vs. *Allen* and with this Court's per curiam opinion (R. 458), and found, after reviewing all of the circumstances, that neither confession was the product of coercion. (R. 464)

This petition for writ of certiorari was granted on February 23, 1960. (R. 489)

ARGUMENT

I

THE DECISIONS OF THE COURTS BELOW ARE CORRECT

1. Judge Smith Employed a Broad and Liberal Standard in His Review of This Petition on Remand.

On remand, Judge Smith proceeded for the first time to examine the full state trial record. (R. 427) This record included not only the findings of the court as to the admissibility of the confessions and the transcript of the preliminary hearings thereon, but also the petitioner's claims in opposition to the admission of the confessions, the petitioner's claims of proof and requests to charge as well as the testimony presented by the State and the defense, together with the confessions themselves. (R. 314-320, Record on Appeal 967-1041, R. 278-324, R. 325-369, Record on Appeal 1043-1714)

Judge Smith's objective was to determine "whether that record shows any lack of fair hearing or procedural due process or other basis for this Court in its judicial discretion to consider evidence outside the state court record." (R. 432) He was well aware that this Court's opinion "makes it plain" that a federal judge, after review of the state record, may decide to take testimony *"even though no vital flaw is necessarily found."* (R. 430-431) (emphasis added) His opinion is abundantly clear that he did not consider a finding of "vital flaw" an indispensable prerequisite to a *de novo* hearing. He firmly felt, however, that he must adopt some standard to govern the exercise of his discretion to conduct a retrial: "whether we call it a vital flaw or unusual circumstances or a substantial ground for exercise of judicial discretion in granting a hearing, *something* must appear upon

examination of the state record to require a trial *de novo* of the fact issues." (R. 430) (emphasis added)

The majority of the Court of Appeals recognized the liberal test adopted by Judge SMITH:

> "Judge SMITH's own understanding of the broad scope of his power and review upon the remand is vital to a proper determination of this appeal. He did not regard himself as foreclosed from exercising his independent judgment or as in the role of a rubber stamp upon state court conclusions. To him 'the question here is whether on review of the full trial court record (which he had not had before him when he delivered his previous opinion) testimony should be considered in a trial *de novo*.' He knew that he was privileged to 'take additional testimony not considered by the state trial court on constitutional issues, such as lack of due process by the use of coerced confessions, and make an independent determination of the facts, such as the voluntary character of confessions, and (that he) must independently determine whether the conviction may constitutionally stand' but that he might 'not substitute his judgment on factual issues fairly tried (*i.e.* where no vital flaw exists) before a state court on similar evidence.'" (R. 455-456)

Under these broad standards, Judge SMITH examined the state record and found that there was no unfairness or lack of due process and no circumstances warranting rejection of the historical facts as specifically found by the state trier or calling for the exercise of his discretion to make new factual findings. (R. 432-434) Accordingly he proceeded to make his own independent evaluation of these facts, and upon these facts based his constitutional determination that petitioner's rights were not violated and that the writ should be discharged. (R. 435)

Notwithstanding Judge SMITH's finding that "the issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge" (R. 434), petitioner contends that he

should have made "a fresh federal inquiry into the underlying facts." (Petitioner's Brief, p. 36). Petitioner asserts, even though Judge SMITH concluded that "there was no unfairness or lack of due process" in the state court's consideration of Rogers' credibility (R. 433), that he should have conducted a retrial to redetermine credibility.

In short, petitioner claims that the writ of habeas corpus vests a federal court with unbounded and unbridled discretion to hold a trial *de novo* of the factual issues; that a federal judge may at will and without legal standards to guide or govern him, repudiate basic historical facts acknowledged by him to have been fairly found by the state tribunal.

If petitioner's position were to prevail, full hearings and the remaking of historical facts would be required in all cases, even where, as here, the federal judge certifies that the facts have been fairly found and nothing appears to warrant a retrial. Judge CLARK, contrary to all his previous utterances, seems to adopt this view that the federal court should be permitted to remake the historical facts on the ground that the ensuing product would be superior to the state's factual findings. (R. 480)

Such a rule would overturn *Brown* vs. *Allen*, 344 U. S. 443 (1953) and all the host of cases that have consistently held that the constitutional issue must be determined on the historical facts found in the state record. It would repeatedly present the situation posed by the Court of Appeals:

> "Is a convicted state prisoner, having been unsuccesful before a jury of his peers or a judge, to be able via habeas corpus to have his case re-tried by some federal judge in the district of his incarceration and, if so, is the federal judge to have the right to re-determine the historical facts? . . . Take a single case. It is tried and appealed twice in a state court, certiorari is denied. Three, four or ten years later, a federal judge or appellate court takes a different view and decides to believe witness A instead of witnesses B and C

as to coercion. Would it not have been better to have had the case tried originally before a federal judge so that the time and expense of the state proceedings could have been avoided?" (R. 457)

To avoid such a chaotic condition, respondent respectfully submits that *some* standard, *some* test should be applied by a federal court before it rehears facts *de novo*. The procedure carefully formulated by Judge SMITH gives due recognition to the proper balance of federal-state relationships and yet protects the constitutional rights of the petitioner. His decision reveals that he fully understood that it was his duty independently to determine whether the petitioner's conviction may constitutionally stand and that the state court's findings, if fairly made, must serve only as the basis for the consideration of the constitutional issues. (R. 430) And on the other hand, if the subordinate findings of fact by the state trier were unfair or lacking in due process, he was free to order a hearing *de novo*. (R. 432) Thus, having first determined that the state trier fairly and conscientiously arrived at the factual findings, Judge SMITH properly exercised his own independent determination on the ultimate constitutional issue, by affirming the state trier's conclusion that the confessions were not coerced.

Brown vs. *Allen* clearly supports the procedure adopted by Judge SMITH as affirmed by the majority opinion below. Both opinions (Mr. Justice REED and Mr. Justice FRANKFURTER) stress that the resolution of the historical facts differs from the determination of the federal constitutional issue. If the state record does not contain the basic or historical facts; the federal judge may hold a hearing *de novo* to ascertain them before determining the constitutional issue. On the other hand, if the state record specifically sets forth all the necessary historical facts, the federal judge should use these facts to make an independent evaluation of the federal constitutional issue.

"In some cases the State court has held a hearing and rendered a decision based on specific findings of fact; there may

have been review by a higher State court which had before it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases." *Brown* vs. *Allen*, *supra*, at 504.

"On review here of state convictions, all those matters which are usually determined issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple." *Watts* vs. *Indiana*, 338 U. S. 49, 50-51 (1949).

As set forth in *Gallegos* vs. *Nebraska*, 342 U. S. 55, at 61 (1951), the federal courts have the duty to make the ultimate determination as to the voluntary character of the confession but "we give deference to the (state's) conclusions on disputed and essential issues of what actually happened." See, also, *Thomas* vs. *Arizona*, 356 U. S. 390 (1958); *United States* vs. *Murphy*, 2 Cir. 1955, 222 F. 2d 698, 706; *United States* vs. *Jackson*, 2 Cir., 1958, 256 F. 2d 7.

This is not to say, however, that even if the state record contains specific findings of historical facts, the federal judge may never hold a hearing *de novo*. Judge SMITH recognized that "if important evidence exists which the state trial court did not have before it, grounds would exist for exercise of discretion to retry the factual issues." (R. 432) Judge SMITH concluded that there was no need here to invoke this "additional evidence rule."

The liberal standard adopted by Judge SMITH is amply supported in the law. In *United States ex rel. Smith* vs. *Baldi*, 344 U. S. 561 at 569, this Court, in rejecting petitioner's contention that a plenary hearing should have been held, reaffirmed the principles of *Brown* vs. *Allen*, as follows:

"Not unless special circumstances prevail, should the lowest federal court reverse the highest state court in cases where the constitutional issues have been disposed of on the merits by

the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the state court and the allegations in the petition for the writ before the federal court fail to disclose that the state in its prosecution departed from the constitutional requirements. . . .

This review of the proceedings accords with our holding in Brown case."

"Nor has any territorial, state or federal court permitted habeas corpus to relitigate and redetermine issues already litigated to final appellate determination. To do so would cause litigation in criminal cases to be interminable and bring confusion into the administration of justice. A defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies . . . and then supersede those remedies on collateral attack by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them." *Palakiko* vs. *Harper*, *supra* at 80.

The broad scope of review adopted by Judge SMITH on remand and affirmed by the Court of Appeals is in full accord with this Court's *per curiam* opinion in denying certiorari. (R. 418) Petitioner claims that this Court's opinion constitutes a *sub silentio* reversal of the Court of Appeal's opinion and that this Court was in effect saying that, vital flaw or not, a federal judge has unlimited discretion to make fresh factual determinations and has unlimited discretion to take testimony as a means to reach such factual determinations.

We submit, however, that this Court was endeavoring to dispose of petitioner's contention that under the Court of Appeal's decision on remand, "The state record and only the state record is open to the District Court's view." (Reply to Respondent's Brief in Opposition to Petition for Certiorari, p. 2). In rejecting this claim, this Court stated that it reads the opinion of the Court of Appeals as holding that there are circumstances under which the district court may go outside the state record and take testimony, even

though no vital flaw exists. This Court did not use words either of rejection or modification of the Court of Appeal's unambiguous standards for federal review on habeas corpus. If this Court had intended to reject the Court of Appeal's interpretation of *Brown* vs. *Allen*, so as to permit unbridled range in the receipt of evidence on habeas corpus, it surely would have said so in no uncertain terms. From its language confirmatory of the Court of Appeal's opinion, the conclusion is impelled that this Court sanctioned the standards set forth in that opinion. As stated by Judge SMITH:

> "The sense of the Supreme Court's interpretation of the language of the Court of Appeals is that while the District Judge may take additional testimony not considered by the state trial court on constitutional issues, such as lack of due process by the use of coerced confessions, and make an independent determination of the facts, such as the voluntary character of confessions, and must independently determine whether the conviction may constitutionally stand, he may not substitute his judgment on factual issues fairly tried (*i.e.* where no 'vital flaw' exists) before the state court, on similar evidence." (R. 431-432).

The Court of Appeal's opinion, as applied by Judge SMITH, establishes a clearcut procedure on habeas corpus: A federal judge is duty bound to make an *independent appraisal* of the constitutional issues *irrespective of the "vital flaw" test*, and the state court's findings, if fairly made, serve merely as the basis for his consideration of the constitutional issues; only if the subordinate findings of fact by the state trier were unfair or lacking in due process or if there was a vital flaw in the state proceedings, is the federal court free to order a hearing *de novo*.

2. The Courts Below Were Justified in Accepting the State Court's Finding that Rogers did not Request Counsel.

Judge Smith specifically cites this issue as having been "fully and conscientiously tried by an experienced judge." (R. 434) The finding was based on the unassailable right of the trier to observe the witnesses and to pass judgment on their credibility. Rogers testified that he made a request for counsel to Captain Eagan during the evening (R. 245) as well as to another detective in the afternoon. (R. 241) In direct contradiction, Eagan testified that Rogers made no request for counsel during the evening (R. 233) and that the detectives[1] present did not report any such request having been made in the afternoon. (R. 237) Under these circumstances, Rogers' testimony cannot possibly be put into the category of an undisputed fact, as petitioner strives to do.[2] Here was a genuine conflict of evidence which the trial court was required to resolve. Resolution of this conflict depended on observation of Rogers and Eagan on the stand and judgment as to their credibility as witnesses. The court, at the conclusion of the preliminary hearing disbelieved Rogers and credited the testimony of Captain Eagan. Thus the finding has adequate support in the evidence and is properly inclusive of the entire period of questioning. As Judge Smith quite properly observed in his decision after remand, "There was no unfairness or lack of due process in the consideration of this issue in the state court." (R. 433)

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[1] It should be noted that at the hearing held by Judge Smith, these three detectives testified that Rogers in fact made no request for counsel at any time during the afternoon. (R. 41, 58, 66) Captain Eagan did not appear as a witness before Judge Smith.

[2] Even in absence of an explicit denial, under Connecticut law, "A fact is not undisputed merely because one or more witnesses testified to it and no one denied it, for the trial court may not give credence to the witnesses and that is for it to determine."

Maltbie, *Appellate Procedure*, 2nd Ed. 1957, Sec. 158.

Corvo vs. *Waterbury*, 141 Conn. 719, 724 (1954).

Clark vs. *Haggard*, 141 Conn. 668, 674 (1954).

At the first hearing on habeas corpus, Judge SMITH had overturned the ruling of the state court on the basis that "such a request seems most probable." (R. 176) But his finding rested on the lone testimony of Rogers directly refuted by three officers of the law in addition to the record testimony of Captain Eagan. Despite this top-heavy conflict, Judge SMITH chose to credit the accused, dismissing the officers with the statement that "it is quite natural for their recollection," some two and one-half years after the questioning, "to coincide with the version they must subconsciously prefer." (R. 433) This conclusion overlooks the fact that Captain Eagan had testified, within one month of the questioning, before the Grand Jury, and again at the trial shortly afterwards. (R. 230) This conclusion ignores the fundamental fact that Rogers' urge whether consciously or "subconsciously" to prefer his own version would be far more impelling than that of the officers. And this conclusion brands all four officers as being equally debased by their subconscious urges, so that not even one of them could testify truthfully.

> "We know that police standards often leave much to be desired, but we are not ready to believe that the democratic process brings to office men generally less believable than the average of those accused of crime." [3]

It should be noted that Judge SMITH made his finding without ever having seen or heard Captain Eagan — the principal witness during the evening session — from which the confession evolved. The finding was made by Judge SMITH while still laboring under the erroneous impression that Rogers was not warned of his right to remain silent (R. 177, 178), when in fact Rogers himself acknowledges such a warning from Eagan. (R. 28) An officer who offered such a warning and who also informed Rogers that he could not promise him any immunity or benefit (R. 385), should command something more than a sum-

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[3] Dissenting opinion of Mr. Justice JACKSON with Mr. Justice ROBERTS and Mr. Justice FRANKFURTER concurring, *Ashcraft* vs. *Tenn.*, 342 U. S. 143, 167 (1951).

mary dismissal of his "version" that Rogers did not ask for counsel.

Beside the direct testimony of the four officers that Rogers did not request counsel at any time on the day of his first confession, there is the further refutation of Rogers' claim implicit in his express election to dispense with counsel the following day when the coroner explicitly informed him of his right to counsel. (R. 347-348) As to this second confession, petitioner makes no claim that he requested counsel at any time that day. That he was aware of his rights, Rogers acknowledged in his testimony before Judge SMITH. (R. 39) Yet in the face of the coroner's warning he expressly declined to avail himself of these rights. (R. 348)

It should be noted also that, by reason of his prior arrests (R. 195) and as the brother of a police officer (R. 310), Rogers had extensive prior experience with police authorities. Paraphrasing the language in the *Stein* case, *supra*, it may be said that Rogers was not young, soft, ignorant or timid nor was he inexperienced in the ways of crime, its detection and investigation, nor was he dumb as to his rights. *Stein* vs. *New York*, *supra*, at 185-186. *Cf. Eiker* vs. *Alabama*, 352 U. S. 191 (1957); *Leyra* vs. *Denno*, 347 U. S. 556 (1954). He was well aware of his right to remain silent even before being reminded of it by Captain Eagan (R. 28), and he was quite competent to choose to dispense with counsel — as the trial court found he did on the occasion of both confessions. As stated by the Court of Appeals:

> "We see no valid reason for substituting the intuitive inferences of an able and conscientious federal judge on an issue of credibility for those of an able and conscientious state trial judge, where the evidence before each was essentially similar as Judge SMITH said it was." (R. 461)

Faced inescapably by the fact that four officers aver that Rogers made no request for counsel on the day of the first confession and that Rogers rejected the coroner's offer of counsel on the occasion of the second confession, petitioner refers to an episode on the day

following the first confession. At that time, without any request by Rogers for counsel, an office associate of Rogers' counsel endeavored to see him at the jail and was informed by the sheriff that he was being held incommunicado on the coroner's order. With the first confession being already a matter of record, and in the light of Rogers' election to proceed without counsel in his second confession, this occurrence cannot be held to be a constitutional violation.

In his attack on this particular finding, petitioner makes much of the fact that it was filed five months after trial. (Petitioner's Brief, p. 22) True, the formal finding was actually filed after trial in conformity with prescribed appellate procedure,[4] but obviously the *fact* was found by the court in the preliminary hearing directly after the conflicting testimony of Rogers and Eagan. The fact was found by the same judge to whom Judge SMITH pays tribute. It cannot seriously be contended that this finding "fully and conscientiously tried by an experienced judge" (R. 434), does not truly represent his conclusion from the evidence produced at the time of trial. The fact, as then found, was thereafter incorporated into the formal finding in the orderly progress of the appeal.

Nor is there any significance that in accordance with established state practice, the state's attorney submitted a proposed finding which the trial court thereafter adopted.[5] This the court was free to do, so long as the finding truly presented the facts as theretofore found by the court. Petitioner's insinuation that the conscientious and experienced trial judge would supinely accept a finding not in full accord with the fact is altogether unfounded.

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[4] *Conn. Prac. Book*, Sec. 389-391.

[5] Similar practice prevails in the federal courts. See *Rossiter* vs. *Vogel*, 148 F. 2d 292, 293 (2 Cir. 1945). *Schilling* vs. *Schweitzer-Cummins Company*, 142 F. 2d 82, 83 (D.C. 1944). *United States* vs. *Institute of Carpet Manufacturing of America*, 1 F.R.D. 636 (S.D.NY. 1941).

3. The Courts Below Were Justified in Concluding that Petitioner's Constitutional Rights Were not Violated By the Use of His Confessions at the Trial.

The test of voluntariness is "whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime."

Lyons vs. *Oklahoma*, 322 U. S. 596, 602 (1943).

In applying this test of voluntariness and determining the admissibility of the confessions, the state trial court scrupulously applied the so-called "orthodox" rule,[6] long adhered to by the Connecticut courts. Under the orthodox method, the voluntariness of the confession is a question exclusively for the trial judge as a matter of the competency of the evidence and its truth or falsity is a matter exclusively for the jury. Legal writers generally recognize that the orthodox method provides the greatest protection to a defendant because it gives a clear cut adjudication of the constitutional issue which result is impossible under the New York system.

> "The particular procedure employed may, as was suggested earlier, have important consequences on the effectiveness of the defendant's protection against involuntary confessions. It seems likely that the protection is increased by the orthodox procedure under which the trial judge must resolve the conflicting evidence and determine whether a challenged confession is voluntary or not voluntary, before it is permitted to go to the jury."
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> Meltzer, *Involuntary Confessions*, 21 U.N. *Chic. L. Rev.* 317, 325.

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[6] There are two main constitutional methods of handling confessions at trial (1) the "orthodox" method, and (2) the "New York" method, and each state may determine the rule it wishes to follow. *Stein* vs. *New York*, 346 U. S. 156 (1953). *Lyons* vs. *Oklahoma*, *supra*, 3 *Wigmore on Evidence*, Sec. 861.

"A defendant in a criminal trial should at the trial stage be entitled to a cleancut adjudication as to whether he has been deprived of rights conferred by the federal constitution. The New York procedure clearly does not provide for such an adjudication." Meltzer, *Ibid.*, at 351. See also, *Cranor* vs. *Gonzales*, 226 F. 2d 83, at 89 (9 Cir., 1955); 3 *Wigmore on Evidence*, Sec. 861.

In pursuance of the orthodox method, the state trial court in the hearing on the admissibility of the confessions, accorded Rogers the right to have the jury excluded (R. 302); the right to testify and call witnesses in his behalf (R. 239-246); and the right to be immune from cross-examination on the merits. (R. 245-246) Thereafter the court ruled that the confessions were not the result of coercion and were competent for the jury's consideration. (R. 317) In so holding, the court determined only the voluntariness of the confessions without any reference to their truth or falsity. In further compliance with the orthodox method, the jury then considered the circumstances surrounding the making of the confessions in determining their weight and credibility under the court's charge, in part as follows:

"You will give these statements or confessions that you have before you whatever weight you consider they are entitled to, and in determining what weight you consider they are entitled to you consider all of the circumstances under which they were procured so far as these circumstances have been made known to you by the evidence. They include, among other things, the fact that the accused was in custody and under the control of the officers at the time; that he was kept in this status that has been described as incommunicado, and the other elements in the evidence before you; the manner in which he was taken from the jail to the State's Attorney's Office and to the coroner's office, and what transpired on each of those occasions; the facts relating to what was said to him about his desire for counsel and everything else that you recall as being disclosed to you by the evidence, as to the circumstances under which the confessions and statements

were made. All of the circumstances leading up to the making of these confessions, I say to you, are proper for you to consider in determining the weight that you are to give them. . . . It is for you to determine what weight you are to give to them, and in that connection, as I have said, you should consider the circumstances under which they were made. . . ." (R. 292-293)

This entire procedure was in full accord with the approved practice of handling confessions under the orthodox system,[7] and afforded Rogers all the advantage and protection inherent in that system.

The Supreme Court of Errors, on appeal, thereafter sustained the admissibility of Rogers' confessions, reiterating its long-standing rule:

"The test of the admissibility of a confession is whether it was voluntary." (R. 222)

The Connecticut appellate court thereby applied the rule of admissibility established by the federal judiciary consistent with the orthodox method. Thereafter in the course of discussing petitioner's claims, the Connecticut court went on to say:

"The question is whether under these and other circumstances the case, that conduct induced the defendant to confess falsely that he had committed the crime being investigated." (R. 222)

On the basis of this latter statement, the petitioner claims that the Supreme Court of Errors was applying the "truth-falsity" test of admissibility, notwithstanding the earlier categorical statement of the Connecticut court that voluntariness alone constitutes the test of its admissibility in this state. Analysis of the court's decision, in context with the two cases cited therein,[8] establishes be-

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[7] Meltzer, *Involuntary Confessions, supra* at 330.

[8] *State* vs. *Guastamacchio*, 137 Conn., 179 (1950); *State* vs. *Zukauskas*, 132 Conn. 450 (1945).

yond question that the Supreme Court of Errors was not deviating from its requirement of voluntariness, but was emphasizing the necessity of a causal connection between the circumstances complained of and the ensuing confession. Both of these cases cited by the state court concerned the indispensability of such a causal connection; both of them applied the Connecticut test of voluntariness; neither of them recognizes or refers in any way to the "truth-falsity" standard as a test of admissibility applicable in the State of Connecticut.[9] So it is clear that the Supreme Court of Errors was not thereby adopting the truth-falsity test.

In any event, this ambiguity by the appellate court, if such it be, is not at all relevant in these proceedings. See, *Strobel* vs. *California*, 343 U. S. 181, 197 (1942). The crucial criterion on this point is the action of the *trial court* and the test and procedure which that court followed in admitting the confessions into evidence. A glance at the state record is sufficient to assure that the test and procedure employed by the trial court met all the constitutional requirements of due process. The trial court concerned itself only with the issue of voluntariness. It specifically excluded any questions during the preliminary hearing concerning the truth or falsity of the confessions (R. 245-246), and it expressly delegated the truth-falsity issue to the jury's consideration alone:

> "You will recall that when the State offered these confessions in evidence you were excused while I considered the question of their admissibility. That I did hold these confessions were admissible you know. I want to caution you now, however, that this ruling on my part meant no more than that, in the performance of my duty, I concluded that

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[9] In *State* vs. *Guastamacchio*, *supra* at 183, the court states "it does not appear that the detention had any *casual connection* whatever with the giving or signing of the statement." (emphasis added); and in *State* vs. *Zukauskas*, *supra* at 459, the court states that, "The fact that an accused was illegally detained when the confession was made did not render it inadmissible unless that fact was *causally* connected with the securing of the confession." (emphasis added).

the circumstances surrounding the making of those statements were such that you should have them before you for your consideration and that my ruling is not to be taken by you as giving to those statements any more weight in your deliberations than you conclude they should have." (R. 292)

After this Court denied certiorari, 351 U. S. 952 (1956), petitioner sought this writ of habeas corpus. (R. 152). In its memorandum of decision ordering petitioner discharged from custody, the district court revealed its misconception of its role when called upon to examine the legality of a state prisoner's detention:

"On habeas corpus, the federal court *must* make its own determination of the underlying facts on the issues presented to it." (emphasis added) (R. 178)

In support of its ruling, the district court cited the *Cranor* case. But, as pointed out by the court of appeals, Judge SMITH and the petitioner misconstrued the holding of that case:

"The relator's reliance upon *Cranor* vs. *Gonzales, supra*, is misplaced . . . because there was no express finding as to the voluntariness of the confession in the state court, the federal court had no State finding to which it could have referred. The District Judge therefore, was faced with two choices. He might have attempted to acquire a trial transcript of the State trial and make his findings from the raw evidence therein contained; or, he might have held a hearing de novo. In the circumstances of the *Cranor* case justice might more surely have been achieved by the latter procedure which permitted observation of the witnesses. For credibility was crucial and had never been expressly determined before.

"The essential distinction between *Cranor* and the instant case is obvious. Connecticut follows the so-called 'orthodox' rule in testing the admissibility of confessions. *State* vs. *Guastamacchio*, 137 Conn. 179, 75 A. 2d. 429; *State vs. McCarthy*, 133 Conn. 171, 49 A. 2d. 594, 3 *Wigmore On Evidence*, Sec. 861. Here, the trial judge in conformity with that rule held a hearing before trial, made express findings, and concluded that the confessions were each voluntary.

> Whether we shall adopt the *Cranor* rule is a decision which can be deferred until we are presented with a case in which a state court has invoked the so-called 'New York' rule. It is sufficient for present purposes merely to observe that *Cranor* does not hold that a federal court on habeas corpus may try de novo an issue of fact which was expressly determined in the state trial." (R. 395-397)[10]

After remand, a majority of the Court of Appeals agreed with Judge SMITH that the circumstances surrounding the confessions were not such as to render them involuntary or inadmissible in evidence. In dissent, Judge CLARK asserts that a federal court may "make its own revaluation of the basic facts." (R. 480) But respondent has never disputed the power of the federal court to *revalue* historical facts in order independently to determine the constitutional issues. Our objection goes to the *remaking* of facts fairly found by the state court. The cases cited by Judge CLARK and petitioner in fact support our contention that in the absence of special circumstances, a federal court may not remake the historical facts:

> In *U. S. ex rel. Caminito* vs. *Murphy, supra,* (CLARK, C. J., sitting on the panel), the Court of Appeals expressly determined the constitutional issue on the undisputed facts and ignored all parts of relator's testimony which were disputed by police officers and made no attempt to retry the credibility of witnesses. Chief Judge CLARK, in his concurring opinion, stated that:
>
> ". . . . I doubt the utility for dignified or effective law enforcement of review and overturn by a federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals" and ". . . *I can respect the views of the state judges*

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[10] It is interesting to note that the petitioner strongly urges this Court to accept Judge SMITH's initial conclusion that he must hold a hearing de novo but now on this appeal by implication rejects Judge SMITH's citation of the *Cranor* case as authority for that conclusion.

as rationally developed, even though I must disagree." 222 F. 2d at 706. (emphasis added)

In *U. S. ex rel. Sileo* vs. *Martin*, 2 Cir., 269 F. 2d 586, SMITH, J., writing for an unanimous Court, specifically employed the "unusual circumstances" or "vital flaw" test, before ordering the lower federal court to hold a hearing de novo. The "vital flaw" in this case arose from the lack of specific findings of historical facts.

In *U. S. ex rel Wade* vs. *Jackson*, *supra*, (CLARK, C. J., sitting on the panel), the Court expressly states at page 13 that "it is not our province" to pass on credibility of police witnesses but that the function of the federal court is "to make (its) own independent examination of the record to determine whether on the basis of the undisputed facts there is any merit to the claim," 256 F. 2d at page 9. (In the case at bar, Judge SMITH, on remand, after searching the state record and finding no reason not to accept the state trier's historical facts, made his independent determination of the constitutional issue upon those facts, precisely as sanctioned by JUDGE CLARK in the *Wade* case.)

In *Payne* vs. *Arkansas*, 356 U. S. 560 at page 562, this Court again stressed that a state court's findings of fact if fairly made upon substantial and conflicting testimony, as to the circumstances surrounding the contested confession "are not this Court's concern." (In the present case, Judge SMITH specifically found that the state trier's findings of historical facts were fairly and conscientiously made by an experienced judge.) (R. 434)

To the same effect see *Fikes* vs. *Alabama*, 352 U. S. 191; *U. S. ex rel. Corbo* vs. *LaVallee*, 2 Cir., 270 F. 2d 513; *Leyra* vs. *Denno*, *supra*; *U. S. ex rel. Savini* vs. *Jackson*, 250 F. 2d 349, 351; *U. S. ex rel Alvarez* vs. *Murphy*, 2 Cir. 246 F. 2d 871, 265 F. 2d 497.

Analysis of petitioner's five principal points reveals that Rogers' constitutional rights were not violated and that Judge SMITH's decision on remand sustaining the holding of the whole hierarchy of the Connecticut state judiciary was not erroneous.

(A) There Was No Lack of Warning

It is not true in fact that Rogers was not informed of his rights. Both Rogers and Eagan are in agreement that adequate cautions were given. Petitioner ignores this decisive testimony of Rogers himself.

> "Q. What took place after he (Eagan) got there? A. He sat down and started talking about the time I was in the County Jail on parole from Elmira that he remembered me from then, and then said . . . in other words, *I didn't have to say nothing to him.*" (R. 28) (emphasis added)

Certainly no more authoritative witness than Rogers himself could be produced to prove that, before confessing, he was aware of his right to remain silent. Here he presents proof positive that he was unequivocally told and that he thoroughly understood his right "to say nothing."

In an effort to show that Eagan did not warn Rogers (1) that "anything he said would be used against him" and (2) that "he didn't have to say anything," petitioner quotes merely a limited portion of Eagan's testimony. (Petitioner's Brief 46) Petitioner avoids the testimony given by Eagan when he was finally free to phrase his responses "the way you think you ought to answer it." (R. 201) His testimony establishes that he told Rogers "what he told me would not be of any benefit to him . . . because I had no power to draft any charge" (R. 201), and again, "nothing he talked to me about, *if he did talk*, could be of benefit to him, it would be up to the court or jury. . . ." (R. 385) (emphasis added) These warnings might not have been couched in the formal terms which petitioner's counsel tried to insist upon, but they were in language which petitioner could and, admittedly, did understand.

Although "lack of warning" loomed large in Judge SMITH's original decision, it is obvious that he, too, had overlooked this vital testimony of Rogers, in whose credibility on the issue of re-

quest for counsel he had placed such faith. Confronted on remand with this explicit acknowledgment by Rogers, Judge SMITH makes not even a mere mention of "lack of warning" in his ensuing decision.

From these explicit statements by Captain Eagan and from Rogers' own acknowledgment, there is no dodging the conclusion that Rogers was fully aware of his right to keep silent and that what he said would be used against him. In point of fact however, Rogers did not need to be informed or instructed on these matters. His information on this subject long antedated this questioning. His vast experience with the police (R. 195, 319) admirably equipped him with adequate knowledge of his constitutional rights. The warnings given by Captain Eagan served effectively to reinforce his prior knowledge on the subject.

Nor can there be any question as to the second confession. The record contains the full statement of the coroner as to Rogers' right to remain silent as well as his right to counsel, followed by Rogers' acknowledgment of his understanding of these rights. (R. 347-348)

(B) The Statement of Intention to Request Rogers' Wife Does Not Constitute a Threat

During the course of the interrogation Captain Eagan informed Rogers that he was intending to send for Rogers' wife in order to question her as to any knowledge she might have of the affair. (R. 234, 385) This statement petitioner contends to be a threat which overcame Rogers' powers of resistance and resulted in an involuntary confession. We respectfully submit that such a statement does not constitute a threat, and certainly, as even Judge SMITH concedes, it was hardly likely to cause a confession to a capital crime. (R. 179)

The police here were engaged in the investigation of a brutal murder. Rogers, by reason of his possession of the murder

weapon was a reasonably natural suspect. No investigation worthy of the name would fail to give high priority to the questioning of Rogers' wife. Rogers concedes that Captain Eagan asked him whether he had any conversations with his wife regarding the crime. (R. 243) As stated by the court of appeals "she was a legitimate subject of police inquiry". (R. 464) Since questioning her would not have been illegal, a mere statement of an intention to do so should not be considered illegal. And most certainly it should not be classified as a threat that would vitiate a confession. A statement to do something that an officer has a right to do is not a "threat" in the legal sense.[11]

Statements almost identical to those used by Captain Eagan have been upheld in both federal and state courts:

In *Vogt* vs. *U. S.* 5 Cir, 156 F. 2d 308 (1946), police officers stated: "We are going to pick up your wife and bring her down to jail and question her, too." In sustaining the admissibility of the confession the court held at page 312: "Such a remark by the investigating officers cannot be classified as such a threat as would destroy the voluntariness of the defendant's confession. Even if one of the defendants made the confession in order to prevent his wife from being investigated, it was, nevertheless, his voluntary statement."

In *Hawkins* vs. *U. S.*, D.C., 158 F. 2d 652 (1946), the court stated that such threats would not render the confession involuntary, because "it is not obviously probable that a man who confesses to a capital crime does so in order to expedite the release of relatives who are not implicated or accused, even if he had been told that this result will follow."

In *People* vs. *Hubbell*, 128 P. 2d 579 (1942), the court held that the defendant's motive to prevent children from being brought into court did not render the confession involuntary, stating at page 594, that: "It must be apparent that a

[11] *United States* vs. *Danlong*, 60 F. Supp. 235, 236 (1945).

confession dictated by the hopes and motives of the accused and inspired solely by his own mental processes and emotions is voluntary in the legal sense."

See also *Ruhl* vs. *U. S.*, 10 Cir. 148 F. 2d 173 (1945); *Henson* vs. *State*, 159 Tex. Cr. 647, 266 S.W. 2d 864 (1954); *State* vs. *Griego*, 294 P. 2d (1956); *State* vs. *Beard*, 16 N. J. 50, 106 A. 2d 265 (1954); *State* vs. *Pierce*, 72 A. 2d 311 (1950); *People* vs. *Curely*, 114 Cal. App. 2d 577, 250 P. 2d 667 (1952); *McCutcheon* vs. *State*, 159 Tex. Cr. 61, 261 S. W. 2d 329 (1953); and *People* vs. *Candiotto*, 275 P. 2d 500 (1954).

Even assuming that the statement might be construed as a threat, it was not the motivation for either of the confessions. Rogers' acknowledgment that he would not have confessed had he known that his wife could not be used as a witness against him (R. 38), shows that he was concerned as to what incriminating information she might disclose, and completely refutes the claim that he confessed to save her from police interrogation. It conclusively establishes that the "threat" was not the motivating cause of the confession.

Petitioner seems to concede that Mrs. Rogers would be a legitimate subject of inquiry but claims that she was rendered immune because she was "ailing" and "arthritic." (Petitioner's Brief 47-48) Judge CLARK in his dissenting opinion goes even further and refers to "his crippled wife," (R. 474) although there is not the slightest evidence to support either claim beyond the bare assertion of Rogers himself. If she was in fact sick, Rogers would have said so to Eagan. Instead, he acknowledges that the only objection interposed by him was: "She don't know anything." (R. 28) Significantly, Eagan recalls it as "She wouldn't know anything about anything I do." (R. 265) At no point does Rogers claim that he told Eagan his wife was sick and Eagan specifically testified that he knew of no such sickness (R. 199), and Detective Holtz, too, testified he "never heard of that." (R. 67) Add to this the undeniable fact that Mrs. Rogers exhibited no difficulty

in daily attendance at the protracted trial without assistance (R. 67), and it becomes obvious that her "sickness" was not a factor in the confession.

Far more reasonable is the inference that Rogers' motive in confessing was his own self-interest and not the result of solicitude for his wife. During the hour which he used to consider whether to confess (R. 243), he had ample time to ponder the substantial nature of the proof against him: his possession of the murder gun on the day of the murder (R. 285-286); his false report to the police directly after the murder that the gun had been stolen by persons unknown (R. 286); his possession of the murder gun on the night of his arrest; his contradictory statements at the time of that arrest, first claiming that he won the gun, and afterwards admitting that he had stolen it from his nephew's home on the day of the murder. (R. 285-286)

Reflecting on these formidable facts, he considered some means of mitigating his plight by putting the best possible face on the crime which he could not longer deny. Accordingly he hit upon the time-worn expedients of blaming liquor and the victim who could not longer refute him. He first claims that he was drinking (R. 200) and then concocts an adulterous relationship with the decedent culminating in abusive remarks as provocation for the shooting. (R. 325-346) By these excuses, he hoped to gain some measure of exoneration. This was his motivation in confessing. The "threat" was actually inconsequential.

Rogers' claim that the effect of this "threat" persisted so as to motivate his confession the next day is even more untenable. (R. 38) When Rogers was presented before the coroner, some twenty hours had elapsed since the "threat" was made. Instead of being transported by police officers, the high sheriff, who had legal custody of Rogers, produced him before the coroner. (R. 16) Captain Eagan was not among those present. The tribunal was one specifically authorized by law. The coroner advised Rogers of his rights at length (R. 40) and Rogers concedes that he

understood what his rights were. (R. 39) These differences in circumstance, in time, and place, and cast of characters impel the conclusion that the effect of this "threat" had been completely dissipated prior to his second confession. This conclusion is all the more indicated by reason of the anemic character of Captain Eagan's statement. It should be noted, too, that the "threat" allegedly was to be put into operation only if Rogers did not confess. With Rogers' first confession already a matter of stenographic record, the threat lost all substance and relevance.

Lyons vs. *Oklahoma, supra* at 602.

(C) The Removal from Jail Was Not a Constitutional Violation

It should be noted that on the date of the confession, petitioner was being held in the county jail on lawful process relating to other charges. On receipt of the ballistics report, petitioner naturally became an immediate subject for interrogation. Concededly, he might have been questioned at the jail. Instead, by written request of the state's attorney's office addressed to the jailer, he was brought to that office for questioning. (R. 266) Concededly, his presence there could have been brought about by court order. However, since the lack of such order was completely unknown to Rogers, his confession cannot be claimed to be causally connected with the method used.[12]

Petitioner claims that his removal was illegal, citing Section 54-15 of the Connecticut General Statutes. Even if this were so, Connecticut law holds that a confession if otherwise admissible cannot be rejected for that reason.[13] In any event this statute does not prohibit a suspect from being temporarily removed from jail for interrogation concerning another crime. It relates merely

[12] *Sykes* vs. *United States* (D.C.), 143 F. 2d 140 (1944). *State* vs. *Guastamacchio*, 137 Conn. 199, 183 (1950).

[13] *State* vs. *Zukauskas*, 132 Conn. 450, 458. *State* vs. *Buteau*, 136 Conn. 113, 123. *State* vs. *Guastamacchio, supra.*

to his ultimate discharge from jail. Even under the *McNabb* doctrine in federal jurisdictions police, without court order, may lawfully examine a prisoner arrested and held on other charges. *Palakiko* vs. *Harper*, Warden, *supra*; *U. S.* vs. *Carignan*, 342 U. S. 36, 45 (1951).

In these cases this Court pointed out that constitutional requirements do not forbid such private examination of persons in lawful custody. Assuming *arguendo* that Rogers' removal without court order was illegal, it was at most a technical irregularity and does not constitute a constitutional violation. *Palakiko vs. Harper, supra* at 94; *Rogers* vs. *Richmond, supra*, (R. 463); *U. S.* vs. *Carignan, supra* at 39. As Judge SMITH acknowledged in his original decision, this ground was not sufficient in itself to vitiate petitioner's confessions and did not constitute a denial of due process. (R. 179) See also *Stein* vs. *New York, supra*; *State* vs. *Buteau, supra*; *State* vs. *Guastamacchio, supra*.

(D) There Was no Prolonged Questioning

The state trial judge found that Rogers was not subjected to continuous or extended questioning. (R. 316) The district court acknowledged that the questioning was intermittent. (R. 176) Concededly, there was here none of the "pressure of unrelenting interrogation," which was condemned in *Watts* vs. *Indiana*, 338 U. S. 49, 54 (1949).

The questioning period falls far short of limits heretofore found unobjectionable by this Court:

Lisenba vs. *California*,[14] where the defendant got no sleep in the first forty-two hours of questioning.

Gallegos vs. *Nebraska*,[15] prolonged questioning on five days.

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[14] 314 U. S. 219 (1941).

[15] 342 U. S. 55 (1951).

Stein vs. *New York*,[16] twelve hours of intermittent questioning.

Lyons vs. *Oklahoma*,[17] questioning from 6:30 P. M. to between 2 and 4 A. M.

Here the questioning started at 2:00 P. M. (R. 195) and Rogers confessed shortly after 10 P. M. (R. 195) From this elapsed time, there should be subtracted the one full hour during which Rogers considered whether to confess (R. 243), and what to claim in mitigation; and there should also be deducted the several intermissions heretofore referred to for the serving of food and coffee, smoking, going to the men's room, telephone calls and checking by the police. (R. 34-37, 316) Compare this time with the cases cited above where the confessions were found voluntary. Contrast this time with cases where this Court has ruled the confessions involuntary:

Watts vs. *Indiana*,[18] five-night sessions with loss of sleep.

Turner vs. *Penn.*,[19] questioning for four consecutive days.

Malinski vs. *New York*,[20] questioning on five days.

Harris vs. *South Carolina*,[21] questioning for twelve hours and two other sessions.

As stated in *Stein* vs. *New York*, *supra* at 184:

> "Interrogation is not inherently coercive as is physical violence . . . this Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive. . . . Of course the process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief as to accomplish extortion of an involuntary confession."

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[16] 346 U. S. 156 (1953).
[17] 322 U. S. 596 (1944).
[18] 338 U. S. 49 (1949).
[19] 338 U. S. 62 (1949).
[20] 324 U. S. 401 (1945).
[21] 338 U. S. 68 (1949).

Rogers' own testimony establishes that there was no such deprivation, and the district court has found that the questioning was not unremitting. (R. 176) Hence it can be said that the questioning here was not of such length or character as to be coercive.

> "Questioning is an indispensable instrumentality of justice . . . we cannot read an indiscriminate hostility to mere interrogation into the Constitution without unduly fettering the states in protecting society from the criminal."
>
> *Ashcraft* vs. *Tenn.*, 322 U. S. 143, 160 (1951).

(E) Assuming, Arguendo, That Petitioner Did Request Counsel, There Was No Violation of His Constitutional Rights

We have heretofore pointed out (1) that the courts below were amply justified in accepting the state court's finding that petitioner did not request counsel at any time prior to his confessions and (2) that any finding to the contrary must necessarily be based on the premise that four officers sworn to uphold the law are perjurers while a confessed murderer is altogether trustworthy as a witness in his own trial. (Point 2, *supra*) We further maintain that even assuming, *arguendo*, that petitioner did request counsel, there was no violation of his constitutional rights.

Petitioner was not under arrest or under indictment for the Kennedy murder when he was questioned by the police. His status as a suspect brings him clearly within the rules set forth by this Court in the *Crooker* [22] and *Cicenia* [23] cases. As stated in *Crooker* vs. *California*, *supra* at 437:

> "The bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained."

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[22] 357 U. S. 433 (1958).
[23] 357 U. S. 504 (1958).

Both these cases expressly permit police interrogation of a suspect, without the presence of counsel, prior to a formal accusation of crime. Petitioner seeks to distinguish them on the grounds that Rogers had "formal criminal charges" lodged against him while the defendants in these other cases did not. Even if this were sufficient ground for distinction it cannot serve here, where the interrogation had no relation to the formal charges pending against Rogers.

Petitioner seems to urge a rule barring use of a voluntary confession in a capital case if it was procured during interrogation of the defendant *as a suspect* unless he was specifically given an opportunity to secure counsel. Petitioner claims that such a confession is void *ab inito* even if there is "no specific showing of prejudice." (Petitioner's Brief, p. 53) But, "Even in federal prosecutions this Court has refrained from laying down any such inflexible rule." *Ciccnia* vs. *Lagay*, *supra* at 509. And this Court, in *Crooker*, at pp. 439-440, emphasized that prejudice must be shown before this Court will set aside a state court conviction. The test is "Whether petitioner's denial of counsel at pretrial stages so prejudiced him that it infected his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'"

Since the record is barren of any evidence that counsel could have advised Rogers of any right that he was unaware of or not advised of by Captain Lagan, petitioner is relegated to the necessity of claiming that prejudice need not be proven by him. If the function of counsel is to advise his client of his right to keep silent and that anything he says can be used against him, certainly, in the case of Rogers, the absence of counsel was not prejudicial. For, as heretofore pointed out, Rogers was amply warned of his rights and he fully understood them. (Point 3A, *supra*)

That this Court draws a distinction between state prosecutions and federal proceedings is further evidenced by its citation of this case, *State* vs. *Rogers*, as authority for the proposition that cer-

tain states have a rule that an accused has no right to consult with counsel during the period of police interrogation and prior to arraignment, which rule this Court recognizes as well within the constitutional province of the police powers of each state. 357 U. S. at 519. *Cf. McNabb* vs. *U. S.*, 318 U. S. 332 (1943); *Glasser* vs. *U. S.*, 315 U. S. 60 (1942) Deviation from this settled rule would require this Court "to apply the Fourteenth Amendment in a manner which would be foreign both to the spirit in which it was conceived and the way in which it was implemented by this Court. The Fourteenth Amendment does not reach so far." 357 U. S. at 510.

(F) Neither Singly Nor in Combination Would These Circumstances Violate Due Process

Without by any means conceding that these factors were present in this case, a review of the leading cases clearly reveals that even where denial of counsel, illegal removal from jail, lack of warning, threat, and prolonged questioning, have been established by clear and convincing proof, they would not either singly or in combination be sufficient to render the conviction invalid. See *Lisenba* vs. *California, supra; Gallegos* vs. *Nebraska, supra; Palakiko* vs. *Harper, supra; Stroble* vs. *California, supra; Stein* vs. *New York, supra.*

As heretofore stressed, the test of voluntariness turns upon "whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime." *Lyons* vs. *Oklahoma, supra* at 602.

Applying this test to Rogers, we see that in the free exercise of his "mental freedom to confess or deny," Rogers made the calculated choice to confess and to invent an elaborate story in excuse and justification in order to serve his own self-interest. His confession was not an abject capitulation. He carefully considered what he should say. The confession itself constitutes a dramatic

refutation of the claim that Rogers lacked mental freedom. It demonstrates his self-possession and coolness throughout. Wtihout full mental freedom he would have been unable to improvise the relationship between the deceased and himself which he claims in provocation of the murder. His recital was not merely a supine attempt to give desired responses to leading questions but was the considered product of his mental processes. Cf. *Leyra* vs. *Denno, supra; Lyons* vs. *Oklahoma, supra* at 605. A full consideration of all of these circumstances "reduced to absurdity his present claim that he was coerced into confession." *Stein* vs. *New York, supra* at 186.

CONCLUSION

The respondent respectfully prays that this Court allow the decision of the Court of Appeals to stand.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1960.

Harold D. Rogers, Petitioner, v. Mark S. Richmond, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 20, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case has a long history. It must be told with some particularity in order to unravel issues ensnarled in protracted litigation in both state and federal courts, turning essentially on the admissibility of confessions.

The Trial.—Petitioner was found guilty of murder by a jury in the Superior Court, New Haven County, Connecticut. The undisputed evidence leading to the conviction may be briefly told. On January 9, 1954, New Haven, Connecticut, police arrested petitioner on charges of committing attempted robbery and other crimes on that day at a local hotel. At the time of his arrest petitioner had in his possession a revolver. Subsequent ballistics tests tended to show that this weapon, which had been reported stolen from the home of petitioner's nephew, was used in a fatal shooting during a liquor store robbery in West Haven, Connecticut, on November 21, 1953, the same day its disappearance was discovered.

Petitioner was lodged in the New Haven County Jail pending trial on the charges that prompted his arrest. On January 30, 1954, he was transported without court order from the jail to the office of the State's Attorney for questioning in connection with the West Haven killing. The interrogation commenced at approximately 2 p. m.

of that day and continued throughout the afternoon and evening. During the interrogation petitioner was allowed to smoke, was brought a sandwich and coffee, and was at no time subjected to violence or threat of violence.

After petitioner had been intermittently questioned without success by a team of at least three police officers from 2 p. m. to 8 p. m., New Haven Assistant Chief of Police Eagan was called in to conduct the investigation. When petitioner persisted in his denial that he had done the shooting, Chief Eagan pretended, in petitioner's hearing, to place a telephone call to police officers, directing them to stand in readiness to bring in petitioner's wife for questioning. After the passage of approximately one hour, during which petitioner remained silent, Chief Eagan indicated that he was about to have petitioner's wife taken into custody. At this point petitioner announced his willingness to confess and did confess in a statement which was taken down in shorthand by an official court reporter.

The following morning the Coroner of New Haven County issued an order that petitioner be held incommunicado at the jail. When a lawyer associated with counsel whom petitioner had previously retained to defend him on the attempted robbery charge called at the jail to see petitioner, he was turned away on the authority of the Coroner's order. Petitioner was then transported to the County Court House for interrogation by the Coroner, who had been informed of his confession of the previous night. There he was put on oath to tell the truth but warned that he might refuse to say anything further and advised that he might obtain the assistance of counsel. Petitioner again confessed to the shooting in a statement recorded by the same official court reporter.

Petitioner's defense at the trial was directed toward discrediting the confessions as the product of coercion. In accordance with Connecticut practice, see, *e. g.*, *State*

v. *Willis*, 71 Conn. 293, 41 A. 820; *State* v. *Guastamachio*, 137 Conn. 179, 75 A. 2d 429, the trial judge heard the evidence bearing on admissibility of the confessions without the jury present. At this hearing petitioner testified that shortly after the commencement of the interrogation he asked to see a lawyer but was never permitted to do so. He also testified, with reference to Chief Eagan's pretense of bringing petitioner's wife in for questioning, that this move took the form of a threat to do so unless he confessed and that in making this threat Chief Eagan told him that he would be "less than a man" if he failed to confess and thereby caused her to be taken into custody. According to petitioner his wife suffered from arthritis, and he confessed to spare her being transported to the scene of the interrogation.

The State met petitioner's account with the testimony of Chief Eagan. He testified that petitioner made no request to see a lawyer during his presence in the room. However, it will be recalled that Chief Eagan did not arrive until the questioning had run a course of six hours and that petitioner claimed to have requested counsel during that period. Chief Eagan also denied that he had framed his remarks about bringing petitioner's wife in for questioning as a threat or that he had suggested that petitioner would be "less than a man," etc.

On the basis of the evidence summarized, the trial judge concluded that the confessions were voluntary and allowed them to go to the jury for consideration of the weight to be given them under all the circumstances that led to them. Conviction of petitioner for murder followed.

Review by the Connecticut Supreme Court.—On appeal, the Supreme Court of Errors of Connecticut, finding no error in the trial judge's admission of the confessions, affirmed the conviction. *State* v. *Rogers*, 143 Conn. 167, 120 A. 2d 409.

First Federal Habeas Corpus Proceeding.—In August of 1956, after satisfying the rule of *Darr* v. *Burford*, 339 U. S. 200, petitioner sought a federal writ of habeas corpus, basically on the ground that since the confessions were secured under circumstances rendering them constitutionally inadmissible, he was denied due process of law under the Fourteenth Amendment. The United States District Court for the District of Connecticut held a hearing based on the evidence offered by the parties. This evidence included excerpts from the record of the state proceedings as well as testimony of petitioner and various state officials. Neither petitioner nor respondent submitted the entire transcript of the state proceedings and the district judge did not call for it. Petitioner again testified that before he confessed he had requested an opportunity to confer with his lawyer. His testimony was flatly contradicted by three police officers called by the State's Attorney, none of whom had testified at the trial.

On the testimony before him, the district judge made findings which differed from those of the state trial judge in several important respects. He accepted petitioner's testimony that during the police interrogation he had asked to see his lawyer before he yielded to Chief Eagan's efforts to have him confess. He also found that the confession before the Coroner was the product of fear that repudiation of the earlier confession would lead the police to take his wife and foster children into custody. Accordingly, he concluded that "The confessions were the result of pressure overcoming Rogers' powers of resistance and were not voluntary on his part." *United States ex rel. Rogers* v. *Cummings*, 154 F. Supp. 663, 665. He therefore set aside the judgment of conviction.

First Court of Appeals Review.—On appeal, the United States Court of Appeals for the Second Circuit vacated the District Court's judgment, finding that it was error to

hold a hearing *de novo* on issues of basic evidentiary fact that had been considered and adjudicated by the state courts. Relying on *Brown* v. *Allen*, 344 U. S. 443, the Court of Appeals concluded that the district judge should have called for the entire state record before reaching his decision. It held

> "that in the case now before us the nature of the issues presented and proper regard for the delicate balance of federal-state relationships required the District Judge to obtain and examine the State proceedings. . . . Only on an adequate state record can the District Court determine if a vital flaw exists which warrants correction by extrinsic evidence." *United States ex rel. Rogers* v. *Richmond*, 252 F. 2d 807, 810, 811.

The Court of Appeals remanded the case to the District Court with the following instructions:

> "Unless the judge below shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of Brown v. Allen, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the State trial court." 252 F. 2d, at 811.

Certiorari Proceeding.—The petitioner sought certiorari here and we denied the petition with this *per curiam* opinion:

> "The petition for writ of certiorari is denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen*, 344 U. S. 443, 506, *et seq.*" *Rogers* v. *Richmond*, 357 U. S. 220.

Second Federal Habeas Corpus Proceeding.—On remand, the district judge had before him the entire transcript of the state proceedings and on the basis of it dismissed the petition. *United States ex rel. Rogers* v. *Richmond*, 178 F. Supp. 69. While he adhered to his belief in petitioner's testimony in the first habeas corpus hearing, he now considered himself obliged to accept the state court's "Findings," rather than his own, on all points of historical fact "unless some vital flaw or unusual circumstance exists or some other basis appears for consideration of testimony outside the record." 178 F. Supp., at 71–72. The district judge found no such "flaw" or "circumstance" to permit retrial of the issue of the voluntariness of the confessions. He thus stated his position:

> "The issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge. Subsequent disagreement with his weighing of essentially similar evidence is not in itself sufficient under the limitations now imposed in the interest of proper balance in our dual court system, to permit consideration of the matter heard at the trial of the issue de novo here." 178 F. Supp., at 73.

On this basis the district judge could not find that the confessions were the product of coercion.

Second Court of Appeals Review.—The Court of Appeals for the Second Circuit affirmed this judgment, one judge dissenting. *United States ex rel. Rogers* v. *Richmond*, 271 F. 2d 364. The court held that the district judge was correct in restricting himself to the state court's "Findings" regarding petitioner's request to see his lawyer before confessing, and agreed with him that the facts in the record did not justify the conclusion that petitioner's confessions were not voluntary.

Because issues concerning the appropriate procedure for dealing with petitions for federal habeas corpus in relation

to state convictions were urged, we brought the case here. 361 U. S. 959.

A critical analysis of the Connecticut proceedings leads to disposition of the case on a more immediate issue. For it compels the conclusion that the trial judge in admitting the confessions as "voluntary," and the Supreme Court of Errors in affirming the conviction into which the confessions entered, failed to apply the standard demanded by the Due Process Clause of the Fourteenth Amendment for determining the admissibility of a confession.

Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i. e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. *See Chambers* v. *Florida*, 309 U. S. 227; *Lisenba* v. *California*, 314 U. S. 219, 236; *Rochin* v. *California*, 342 U. S. 165, 172–174; *Spano* v. *New York*, 360 U. S. 315, 320–321; *Blackburn* v. *Alabama*, 361 U. S. 199, 206–207. And see *Watts* v. *Indiana*, 338 U. S. 49, 54–55. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such

verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.

In the present case, while the trial judge ruled that each of petitioner's confessions was "freely and voluntarily made and accordingly was admissible in evidence," he reached that conclusion on the basis of considerations that undermine its validity. He found that the pretense of bringing petitioner's wife in for questioning "had no tendency to produce a confession that was not in accord with the truth." Again, in his charge to the jury, he thus enunciated the reasoning which had guided him in admitting the confessions for its consideration:

> "No confession or admission of an accused is admissible in evidence unless made freely and voluntarily and not under the influence of promises or threats. The fact that a confession was procured by the employment of some artifice or deception does not exclude the confession if it was not calculated, that is to say, if the artifice or deception was not calculated to procure an untrue statement. The motive of a person in confessing is of no importance provided the particular confession does not result from threats, fear or promises made by persons in actual or seeming authority. The object of evidence is to get at the truth, and a trick or device which has no tendency to produce a confession except one in accordance with the truth does not render the confession inadmissible. . . . The rules which surround the use of a confession are designed and put into

operation because of the desire expressed in the law that the confession, if used, be probably a true confession."

The same view—that the probable reliability of a confession is a circumstance of weight in determining its voluntariness—entered the opinion of the Supreme Court of Errors of Connecticut in sustaining the trial judge's admission of the confession:

> "If we concede that this [petitioner's claims of illegal removal from jail and incommunicado detention] was all true and that such conduct was unlawful, it does not, standing alone, render the defendant's confessions inadmissible. The question is whether, under these and other circumstances of the case, that conduct induced the defendant to confess falsely that he had committed the crime being investigated. Unless it did, it cannot be said that its illegality vitiated his confessions." 143 Conn., at 173; 120 A. 2d, at 412.

And again:

> "Proper court authorization should have been secured before the defendant was removed from the jail. There is nothing about his illegal removal, however, to demonstrate that he was thereby forced to make an untrue statement. The same can be said concerning the refusal to admit counsel to see the defendant on the morning of January 31 before he was brought before the coroner." 143 Conn., at 173–174; 120 A. 2d, at 412.

Concerning the feigned phone call that petitioner's wife be brought in to headquarters, the Supreme Court concluded:

> "Here again, the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence untrue statement." 143 Conn., at 174; 120 A. 2d, at 412.

From a fair reading of these expressions, we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity.[1] And this is not a

[1] We find support for this conclusion in a line of Connecticut cases, some of which are cited by the Supreme Court of Errors in *Rogers*. See *State* v. *Willis*, 71 Conn. 293, 307–312, 41 A. 820, 824–826; *State* v. *Cross*, 72 Conn. 722, 727, 46 A. 148, 150; *State* v. *DiBattista*, 110 Conn. 549, 563, 148 A. 664, 669; *State* v. *Palko*, 121 Conn. 669, 680, 186 A. 657, 662; *State* v. *Tomassi*, 137 Conn. 113, 127–128, 75 A. 2d 67, 74; *State* v. *Guastamachio*, 137 Conn. 179, 182, 75 A. 2d 429, 431; *State* v. *Lorain*, 141 Conn. 694, 700, 109 A. 2d 504, 507. But see *State* v. *Wakefield*, 88 Conn. 164, 90 A. 230; *State* v. *Castelli*, 92 Conn. 58, 101 A. 476; *State* v. *Zukauskas*, 132 Conn. 450, 45 A. 2d 289; *State* v. *Buteau*, 136 Conn. 113, 68 A. 2d 681; *State* v. *Malm*, 142 Conn. 113, 111 A. 2d 685, containing no reference to a "truth-falsity" test. Connecticut case law regarding the admissibility of confessions allegedly secured under circumstances which render them involuntary, or by means of promises, "artifices," "deception" or illegal police practices not amounting to coercion, is not free from uncertainty. We need not now endeavor to ascertain the extent to which, or the circumstances under which, Connecticut courts generally look to reliability as the criterion, alone or in conjunction with other criteria, of admissibility. If petitioner in the present case has been convicted through the use of a constitutionally impermissible standard, it is indifferent that Connecticut law, in its operation in other cases, may be unimpeachable. What that law does reveal of relevance here is that conceptions of probable truth or probable falsity have had and appear still to have a place in the reasoning of Connecticut judges in classes of cases having similarities to *Rogers* and relied on therein. Without meaning to consider the validity of such reasoning, under the Fourteenth Amendment, in any applications but the one now before us, we do derive from its currency in a continuing line of Connecticut decisions confirmation of our conclusion that the language of the trial judge and of the Supreme Court of Errors in the *Rogers* case is not the product of mere verbal inadvertence or unreflective phraseology, but an accurate embodiment of the mode of reasoning which led to holding that petitioner's confessions were admissible as "voluntary."

permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. The employment instead, by the trial judge and the Supreme Court of Errors, of a standard infected by the inclusion of references to probable reliability resulted in a constitutionally invalid conviction, pursuant to which Rogers is now detained "in violation of the Constitution."[2] A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. This means that a vital confession, such as is involved in this case, may go to the jury only if it is subjected to screening in accordance with correct constitutional standards. To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried, and the conviction was vitiated by error of constitutional dimension.[3]

It is not for this Court, any more than for a Federal District Court, in habeas corpus proceedings, to make an independent appraisal of the legal significance of facts

[2] 28 U. S. C. § 2241 (c)(3).

[3] Determination of the admissibility of confessions is, of course, a matter of local procedure. But whether the question of admissibility is left to the jury or is determinable by the trial judge, it must be determined according to constitutional standards satisfying the Due Process Clause of the Fourteenth Amendment. If the question of admissibility is left to the jury, they must not be misdirected by wrong constitutional standards; if the question is decided by the trial judge, he must not misdirect himself.

gleaned from the record after such a conviction. We are barred from speculating—it would be an irrational process—about the weight attributed to the impermissible consideration of truth and falsity which, entering into the Connecticut trial court's deliberations concerning the admissibility of the confessions, may well have distorted, by putting in improper perspective, even its findings of historical fact. Any consideration of this "reliability" element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known.

As a matter of abstract logic it is arguable that Rogers may not have been deprived of a constitutional right, nor held in custody in violation of the Constitution, within 28 U. S. C. § 2241 (c)(3), solely because the Connecticut trial court applied an impermissible constitutional standard in admitting his confession—that Rogers was not so deprived, or so held, unless "in fact" his confession was coerced, a "fact" to be ascertained from the state record on direct review here, or *de novo* by a federal district judge in habeas corpus proceedings. Such a view ignores both the volatile and amorphous character of "fact" as fact is found by courts, and the distributive functions of the dual judicial system in our federalism for the finding of fact and the application of law to fact. In coerced confession cases coming directly to this Court from the highest court of a State in which review may be had, we look for "fact" to the undisputed, the uncontested evidence of record. See *Watts* v. *Indiana*, 338 U. S. 49, 50–52. This is all that we may look to, in the absence of detailed state-court findings of historical fact, because this Court cannot sit as a trial tribunal to hear and assess the credibility of witnesses. Of course, so-called facts and their constitutional significance may be so blended that they cannot be severed in consideration. And in any event, there must be a foundation in fact for the legal result. See

Thompson v. *Louisville*, 362 U. S. 199. With due regard to these considerations, it would be manifestly unfair, and afford niggardly protection for federal constitutional rights, were we to sustain a state conviction in which the trial judge or trial jury—whichever is charged by state law with the duty of finding fact pertinent to a claim of coercion—passes upon that claim under an erroneous standard of constitutional law.[4] In such a case, to look to the wholly undisputed evidence, in the event conflicting evidence is presented, would deprive the state criminal defendant of the benefit of whatever credit his testimony might have been given by the state judge or the state jury, had the judge or jury employed a proper legal standard. Nor, in a case where specific findings are made concerning the allegedly coercive circumstances, can those findings be fairly looked to for the "facts," since findings of fact may often be (to what extent, in a particular case, cannot be known) influenced by what the finder is looking for. Historical facts "found" in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct con-

[4] A different question was implicitly presented in *Stroble* v. *California*, 343 U. S. 181. In that case the trial judge permitted the confessions to go to the jury under instructions which told it to disregard them if it found that they were not voluntarily made, and which adequately defined the "voluntariness" required by due process. See *Lyons* v. *Oklahoma*, 322 U. S. 596, 601. Thus, there was no flaw in the verdict as rendered. An erroneous legal standard for determining the admissibility of allegedly coerced confessions was interjected into the proceeding only at the level of the Supreme Court of California. Had the State Supreme Court, under similar circumstances reversed the conviction, not on the basis of local law but solely by reason of a misinterpretation of this Court's principles governing coerced confessions, and had the case been brought here for review on certiorari, the jury's verdict would have had to be reinstated. In any event, the question presented in *Stroble* was not faced squarely, and in illuminating isolation, in that case. Compare *Lee* v. *Mississippi*, 332 U. S. 742, with *Stroble*.

clusions if and merely because a correct standard is later applied to them.

Of course, where the issue of coercion is raised not on direct review in this Court but by petition for habeas corpus in a Federal District Court, one alternative method of proceeding impossible on direct review is available. The District Court might conceivably hold a hearing *de novo* on the issue of coercion. But such a procedure would neither adequately protect the federal rights of state criminal defendants nor duly take account of the large leeway which must be left to the States in their administration of their own criminal justice. A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment. Where he has not had that opportunity he should not be required to establish in a Federal District Court, before a federal district judge who must consider the issue of the voluntariness of the confession in a certain abstraction from the whole, living complex of a criminal trial, and perhaps many years after the occurrence of the events surrounding the confession, facts establishing coercion. On the other hand, the State, too, has a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts and juries. To require a federal judge exercising habeas corpus jurisdiction to attempt to combine within himself the proper functions of judge and jury in a state trial—to ask him to approximate the sympathies of the defendant's peers or to make the rulings which the state trial judge might make, within the exercise of his discretion concerning the admission of evidence at the borderline of constitutional permissibility—is potentially to prejudice state defendants claiming federal

rights and to pre-empt functions that belong to state machinery in the administration of state criminal law.

In view, therefore, of the constitutionally inadequate test applied by the Connecticut courts for determining whether the confessions were voluntarily given, we need not, on this record, consider whether the circumstances of the interrogation and the manner in which it was pressed barred admissibility of the confessions as a matter of federal law.[5] In the case before us, the state trial court misconstrued the applicable law of the Constitution and was sustained in doing so by Connecticut's Supreme Court. It was error for the court below to affirm the District Court's denial of petitioner's application for habeas corpus. The case is remanded to the Court of Appeals to be held in order to give the State opportunity, to retry petitioner, in light of this opinion, within a reasonable time. In default thereof the petitioner is to be discharged.

Reversed.

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[5] We do not deal in this case with a situation in which the record—taking all of petitioner's evidence, and the inferences reasonably to be drawn from it, in the light most favorable to him—nevertheless fails to make out a claim of coercion. Since the issue of voluntariness might fairly have gone either way on the whole of the testimony, petitioner has clearly been prejudiced by the application of an erroneous standard to his federal claim by the state trial judge in allowing the confessions to go to the jury.

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1960.

Harold D. Rogers, Petitioner, v. Mark S. Richmond, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 20, 1961.]

Mr. Justice Stewart, whom Mr. Justice Clark joins, dissenting.

Although the matter is not free from doubt, I accept the Court's conclusion that both state courts gave some weight to the probable truth of the confessions in determining that they were voluntary.* But I cannot accept the proposition that the petitioner is entitled to his release by way of federal habeas corpus merely because of the state courts' failure properly to verbalize the correct Fourteenth Amendment test of admissibility. Cf. *Stroble* v. *California*, 343 U. S. 181.

The writ can be extended to Rogers only if he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2241 (c)(3). See *Johnson* v. *Zerbst*, 304 U. S. 458, 465–468; *Hawk* v. *Olson*, 326 U. S. 271, 274–276. In the context of the present

*In Connecticut the jury plays no part in determining the voluntariness of a confession. Connecticut follows the orthodox rule of leaving the determination of admissibility exclusively to the trial judge. *State* v. *McCarthy*, 133 Conn. 171, 177, 49 A. 2d 594, 597; *State* v. *Guastamachio*, 137 Conn. 179, 182, 75 A. 2d 429, 431; *State* v. *Lorain*, 141 Conn. 694, 699, 109 A. 2d 504, 507. Compare *Stein* v. *New York*, 346 U. S. 156. If a confession is admitted, the jury is left to weigh its truthfulness as it weighs other evidence. There is no claim in this case of any error in the instructions to the jury.

case this means that the writ should be granted, if, and only if, a coerced confession was in fact admitted at the trial. See *Leyra* v. *Denno*, 347 U. S. 556. I think, as did the District Court, that in deciding that question the appropriate inquiry for the habeas corpus court is not what test of admissibility the State applied or purported to apply, but whether a confession was admitted which was in fact involuntary under Fourteenth Amendment standards.

I would, therefore, remand the case to the District Court for a plenary hearing to determine this question. Where, as here, the state trial court's determination of admissibility was at least partly affected by the impermissible factor of probable reliability, I think there can be no question of the federal court's duty to hold such a hearing. While the state court's failure to enunciate the correct standard was not itself an error of constitutional dimensions, it did make impossible the federal court's unquestioning reliance on the trial court's findings of fact. Even the most narrow view of what was said in *Brown* v. *Allen*, 344 U. S. 443, would require a plenary hearing in these circumstances.